

## Central Law Journal.

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### PSYCHO-PATHOLOGY AND ITS INFLUENCE ON THE ADMINISTRATION OF THE CRIMINAL LAW.

A recent decision of the English Court of Criminal Appeal has aroused public interest in legal circles in England over the possibility that the science of psychiatry may play a large part in the future determination of the mental responsibility of those charged with crime. *Rex v. Quarmby* (Decided Mar. 21, 1921.) The facts in this case are stated by the Solicitors Journal (March 26, 1921):

"The Court of Criminal Appeal had to consider on Monday in *Rex v. Quarmby* (Times, 22nd inst.), a case which has excited some public interest and which has been the subject of correspondence in our columns. It will be recollected that the prisoner, a man of forty-five, who had lived a blameless life until infatuation for a woman led him astray, confessed the murder of his mistress, but pleaded "irresistible impulse," on indictment for the crime before Mr. Justice Acton at Blackpool. The crime was clearly premeditated, as he had purchased the knife with which it was committed some time beforehand; he was convicted and sentenced to death, but at the trial some rather remarkable evidence was given as regards the state of the prisoner's mind by an official doctor. The prisoner had confessed, but the state of his mind was in doubt. The doctor accordingly, with the prisoner's consent, subjected him to hypnotism and interrogated him as to the crime while under hypnotic influence. The object of Dr. Wilkinson, the doctor in question, was the humane one of trying to ascertain whether or not the prisoner's mind was normal. The result of his investigation, which was conducted on lines of psycho-analysis, would appear to have been that the prisoner, who up to middle life had led a continent life and then had suddenly yielded to sensual temptation, was the victim of a "complex" which had gradually acquired force, until it had become an "irresistible impulse" which the prisoner could not resist. How far such a theory

is capable of being maintained in psychology or in medicine we cannot pretend to say: it opens up an additional and novel possibility. But clearly such defence is unknown to the law of England, and the Court of Criminal Appeal could do nothing else than dismiss the prisoner's appeal."

Justice Darling, who presided in the *Quarmby* case, declared that there are obvious difficulties which beset an English judge when he is required to explain to the jury the law respecting mental responsibility for crime, and that these difficulties would be increased if the tests set up by psychiatrists should be introduced in evidence and must be explained to a jury.

We do not believe that the difficulties in the way of application of the new science of psycho-analysis should deter police officers, judges and legislators from doing their utmost to put these principles into effect. The present practice of trying men over and over again for the same offenses and then turning them out to prey upon society, to steal, to burn, to kill, undeterred by any fear of punishment because of a defective affectivity rather than a defective intelligence is social suicide. The proportion of crime committed by normal persons or by persons of defective intelligence is, according to the experience of continental scientists, almost negligible. The great source of crime is *dementia praecox*. Here the intelligence is often only slightly subnormal and the usual tests of insanity would disclose no abnormal mental conditions. But the tests developed in the great psychiatric clinics at Zurich, Munich and other European centers will, in less than two hours' examination, disclose what, if any, defect exists in respect to one's affectivity. Here is where the psychologist is needed—not the physician. Dr. Hickson, the great psychiatrist of the Chicago Municipal Court, and one of the few experts in psychiatry in this country, in explaining the uselessness of clinical methods of investigation in such cases said:

"From the clinical side in a large percentage of these cases there is nothing very definite on which to establish a diag-

nosis; while at the same time the disease is of the utmost potentiality in the thinking and doing of the victim; this is sometimes called predementia or latent dementia praecox, which, as a matter of fact, is not latent at all except in the physical sense. The psychological side may be quite well advanced and highly potential criminally, while yet there are practically no definite physical or clinical signs; in fact, as a clinical entity dementia praecox in its present and advanced development can hardly be said to exist in a large proportion of cases.

"Many such physical or clinical signs should not be relied upon to make the diagnosis; and it is well known how well cases of dementia praecox paranoides can dissimulate on occasion. By the psychological method we take the diagnosis to the case in the same manner that we take the tests these days to the feeble-minded, and not sit by and have to wait developments, as in the case in many instances diagnosed by the ordinary clinical methods, and these tests are to the dementia praecox in the reliability and applicability what the Binet-Simon tests are to the feeble-minded. These psychological symptoms are as clear and definite to the properly trained man as they are unknown or unappreciated to those unfamiliar with the method."

In the Municipal Court of Chicago, where a psycho-analysis is made of all doubtful cases, it has been discovered that 84 per cent of boy criminals were suffering with dementia praecox, which simply means that these boys have an incurable affectivity—an emotional defect—which will make them criminals all their lives and that society is not only in danger while they are allowed their freedom but that, if permitted to do so, they will rear a brood of morons or emotional defectives who, unless controlled by natural conditions or strict regulation, will ultimately destroy the civilization of any country.

This is the gloomy picture which psychiatrists present to the leaders of modern society, and the only hope they hold out is the confinement of such defectives in early life to Colonies of the Feeble Minded. The commendable efforts of Judge Olson, presiding Justice of the Municipal Court of Chicago, in establishing a Psychopathic

Laboratory in connection with his court, has put the whole country under obligations to him, not only because of the success of the new mental tests which he has had set up, but because of the great interest he has aroused in this subject among lawyers and judges. The editor has learned of the organization of several new societies of mental hygiene formed to study the new science of psychiatry or psycho-analysis in its relation to the commission of crime. A new society of that kind has recently been formed in St. Louis, composed of a majority of the local judges, and is attracting lawyers, teachers and physicians to its ranks.

A glance at the shelves of any public library will show a surprising increase in the number of books on the subject of psycho-analysis or the new psychology as developed by Freud, Bleuler, Kraepelin and others in Europe. A study of this subject should be required in every law school so that those who shall be responsible for the administration of the criminal law in the future shall be fully prepared to deal with the tremendous increase in crime, which, according to psychiatrists, our misguided leniency with criminals has made possible.

#### NOTES OF IMPORTANT DECISIONS

**FEDERAL RESERVE BANKS PROHIBITED FROM FORCING STATE BANKS TO CASH CHECKS AT PAR.**—It was, beyond doubt, one of the purposes of Congress in passing the Federal Reserve Bank law, to establish universal exchange at par for checks sent in interstate commerce. But this purpose is defeated by a recent decision of the Supreme Court of the United States, in *American Bank & Trust Company v. Federal Reserve Bank of Atlanta* (decided May 16, 1921).

The decision will tend to quiet a very bitter controversy which had arisen between state banks and Federal Reserve banks over the practice of the former to make a service charge for cashing their depositors' checks. The Federal Reserve banks were expressly prohibited by law from making a charge for collections and therefore felt that they should not be prevented from serving their customers by clearing checks on small state banks. In order to de-

feat the practice of the country banks of making an absolute collection charge on all checks cashed by it for another bank, a charge justified on the ground of the expense of remitting the proceeds to the forwarding bank, the Federal Reserve banks conceived the idea of accumulating a number of checks on a local bank and having them presented over the counter by an agent. No charge, of course, is made when checks are cashed in that way. In the present case the country banks of Georgia brought suit against the Federal Reserve Bank of Atlanta to enjoin this practice. In reversing a decree of the lower federal courts dismissing the bill, the Supreme Court ordered the hearing to proceed, to show whether in fact plaintiffs would be injured by the practice adopted by the defendants. The Court takes the position that, admitting the allegations of plaintiffs bill (which defendants say cannot be proven), their business would be destroyed by defendant's demand that all exchange shall be at par, then the plaintiffs were entitled to the relief asked.

Justice Holmes, who wrote the opinion for the Court, proceeds in his usual enigmatical manner to show when a right is not a right and becomes a wrong. This argument was in answer to defendants' contention that if their clients could cash the checks at par over plaintiffs' counters, they, as the agents of their clients, could do the same. Justice Holmes' answer to this apparently very plausible contention is characteristic of the philosopher-jurist of our greatest court. Justice Holmes said:

"The defendants say that the holder of a check has a right to present it to the bank upon which it was drawn for payment over the counter, and that however many checks he may hold he has the same right as to all of them and may present them all at once, whatever his motive or intent. They ask whether a mortgagee would be prevented from foreclosing because he acted from disinterested malevolence and not from a desire to get his money. But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. A man has at least as absolute a right to give his own money as he has to demand money from a party that has made no promise to him; yet if he gives it to induce another to steal or murder the purpose of the act makes it a crime.

"A bank that receives deposits to be drawn upon by check of course authorizes its depositors to draw checks against their accounts and holders of such checks to present them for payment. When we think of the ordinary case the right of the holder is so unimpeded that it seems to us absolute. But looked at from either side it cannot be so. The inter-

ests of business also are recognized as rights, protected against injury to a greater or less extent, and in case of conflict between the claims of business on the one side and of third persons on the other, lines have to be drawn that limit both. A man has a right to give advice, but advice given for the sole purpose of injuring another's business and effective on a large scale, might create a cause of action. Banks as we know them could not exist if they could not rely upon averages and lend a large part of the money that they receive from their depositors on the assumption that not more than a certain fraction of it will be demanded on any one day. If without a word of falsehood but acting from what we have called disinterested malevolence a man by persuasion should organize and carry into effect a run upon a bank and ruin it, we cannot doubt that an action would lie. A similar result, even if less complete in its effect, is to be expected from the course that the defendants are alleged to intend, and to determine whether they are authorized to follow that course it is not enough to refer to the general right of a holder of checks to present them, but it is necessary to consider whether the collection of checks and presenting them in a body for the purpose of breaking down the petitioner's business as now conducted is justified by the ulterior purpose in view."

**POWER OF CONGRESS OVER PRIMARIES FOR THE SELECTION OF UNITED STATES SENATORS.**—The same serious mistake which the Supreme Courts of practically every state have made has now been made by the United States Supreme Court by a five to four decision, holding that primaries are not within the meaning of constitutional provisions referring to elections. *Newberry v. United States*, 41 Sup. Ct. Rep. 469.

Congress provided by law that no candidate for senator or representative should expend more than the amount allowed to candidates in the state in which he resides for the purpose of procuring his nomination or election as United States senator. A Michigan statute prohibited the expenditure of more than twenty-five per cent of one year's compensation to procure the nomination for any office, and a like limitation in procuring one's election. Senator Newberry was charged with a conspiracy to violate this law by an expenditure of more than one hundred thousand dollars to procure his nomination as United States senator on the Republican ticket in the state of Michigan. Reversing a judgment of conviction, the Supreme Court held that the power given to Congress by Art. I, Sec. 4, to regulate the manner of holding elections for United States senators did not give Congress power to regulate primaries for the purpose of selecting candidates for United States senators to be placed on the respective

party tickets at the ensuing election. On this point Justice McReynolds, writing the opinion of the Court, said:

"If it be practically true that under present conditions a designated party candidate is necessary for an election—a preliminary thereto—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as the result of his own unsupported ambition does not directly affect the manner of holding the election. Birth must precede, but it is no part of either funeral or apotheosis.

"Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these. It is settled, e. g., that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacture, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress. *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346.

"We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state and infringe upon liberties reserved to the people."

No line of decisions is more discreditable to the judiciary of this country than those holding that primary elections are not "elections" within the meaning of that term as used in the constitution of the various states. Special mention is due the great courts of Illinois, Indiana and Pennsylvania for taking the sensible ground that under our present form of party government, a primary is as much an election as is the final choice made between rival party candidates. *People v. Chicago Election Commissioners*, 221 Ill. 9, 77 N. E. 321; *State v. Hirsch*, 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170; *Leonard v. Commonwealth*, 112 Pa. 607, 4 Atl. 229; *People v. Dineen*, 247 Ill. 289, 93 N. E. 437. The Constitution of the United States is a document couched in most general terms, to abide for all time, and it would be a reflection on the intelligence of the framers of the instrument to presume that they did not have in mind the possibility of any future changes in the manner of holding elections and selecting candidates. When the Constitution

provides that Congress may regulate the "manner" of holding elections for senators and representatives, it has in view every step which should become a necessary and integral part of the plan by which such persons are elected to office. On this point the dissenting opinion of Justice Pitney is interesting. The learned Justice said:

"Why should this provision of the Constitution—so vital to the very structure of the government—be so narrowly construed? It is said primaries were unknown when the Constitution was adopted. So were the steam railway and the electric telegraph. But the authority of Congress to regulate commerce among the several states was extended over these instrumentalities, because it was recognized that the manner of conducting the commerce was not essential. And this court was prompt to recognize that a transportation of merchandise, incidentally interrupted for a temporary purpose, or proceeding under successive bills of lading or means of transport, some operating wholly intrastate, was none the less interstate commerce, if such commerce was the practical and essential result of all that was done."

We are not interested in the result in the particular case. In fact, we believe, with the four dissenting judges, that the conviction should have been reversed on the ground that the Federal Corrupt Practice Act did not intend to limit spontaneous contributions of money by others than the candidate except as he should participate therein. But we do object to the ground of this decision and fear that it will greatly restrict the power of Congress to safeguard the election of United States senators. The whole country is interested in the election of a Senate that will represent the free choice of the people and be wholly free from the domination of men of wealth and commercial influence. It is idle to say that the election and not the primary is the place where this selection is made. Under our present form of party government a United States senator is selected at the respective primaries. No man could hope for election, in most cases, who failed to secure a nomination of one of the great parties. To say that Congress cannot regulate the primaries at which United States Senators are chosen is to put Congress under the domination of the states in respect of a matter which vitally concerns the national interests. For what avails it to regulate elections when the real choice is made at a primary?

We are pleased to note that Justice McKenna concurs in the opinion of the majority only so far as the present statute is concerned, reserving his opinion as to the constitutionality of a statute passed under the power of the Seven-



teenth Amendment. The Corrupt Practice Act was enacted prior to the Seventeenth Amendment, which gave to the people the power to choose United States senators. Under this amendment and the doctrine of implied powers, such an act, it seems to us, would clearly be constitutional.

### CONTRACTING OUT.

During the war the well tried and time honoured principle of English law, freedom of contract, has not received its customary effect. The reasons given for interfering with it are various, such as (1) National defense and security; (2) Impossibility of performance arising from war conditions, and (3) Reasons of public policy. We are inclined to think that the effect on the country of these experiments has been such as to cause a reaction in favour of the principles which lie at the root of the great doctrine of freedom of contract.

In one department, that of the law of landlord and tenant, the interference has been most extensive. By a series of measures commencing in 1915, and now codified in one Act known as the Increase of Rent and Mortgage Interest Restrictions Act 1920, the landlord of a dwelling house or of business premises cannot raise the rent nor can a mortgagee increase his rate of interest, except to an extent allowed by the statute. And so long as such rent and interest is paid the tenant cannot be dispossessed, nor the mortgage called in.

By far the most important decision yet given on the Rent, etc., Restrictions Act, 1920, is that of the Court of Appeal in *Barton & Mitchell v. Fincham* (Times, 9th February). It practically decides that contracting out is not allowable. The ground of decision briefly is that Section 5 of the statute places a clear restriction on the power of the Court to make an order for possession. This cannot be done save in a series of expressly excepted cases, and it follows that, for a landlord to obtain an order, he must bring himself within one of

the excepted cases. This the plaintiffs in the case referred to had not done; the tenant's agreement to give up possession was not an excepted case; hence the Court had no jurisdiction to make an order for possession. The County Court Judge, in granting an order for possession, took the broad ground that the tenant had got twenty pounds as consideration for waiving her statutory rights, and was estopped from setting them up. On appeal this decision stood because the two judges in the Divisional Court, Lush, J., and MacCardie, J., took opposite views as to the law. Mr. Justice Lush was strongly of opinion that it was quite opposed to "public policy" to permit the parties, landlord and tenant, to contract out of the statutory protection afforded to the house. Mr. Justice MacCardie, on the other hand, after a most elaborate and learned analysis of the effect of public policy in the construction of numerous statutes, held that interference with freedom of contract is more opposed to public policy than the protection of tenants who surrender their tenancy for a consideration which they afterwards feel to be inadequate.

In the Court of Appeal all three judges were in agreement. The Court was a strong one, consisting of Lords Justices Bankes, Scrutton, and Atkin. The simple point taken by all the judges was that Section 5 has limited the jurisdiction of the Court to make orders for possession; it cannot make such orders at all except where the conditions precedent prescribed by that section are proved to its satisfaction. Therefore, the landlord and tenant cannot give it jurisdiction by contracting out of the statutory prohibition. This, as a ground of judgment is narrow, but incidentally, although not necessary to the judgment which reversed the Courts below and reinstated the tenant in possession of her house, each of the three learned judges indicated approval of the view that "contracting out" of the statute is opposed to public policy. Lord Justice Scrutton pointed out that, if

a landlord and tenant can contract out of the statute after the tenancy has come into existence, there seems no reason why they should not contract out of it before the tenancy comes into existence; the effect of which would be that, whenever a house became vacant, landlords would re-let only subject to a "contracting out" clause and so exclude all future tenants from the benefits of statutory protection.

It will be seen that in the Court of Appeal the judges did not face the general question of the competency of contracting out as the Divisional Court judges did. The broad rule of our law is that it is competent to contract out of a statute unless the statute itself contains a prohibition against contracting out. Examples of such statutory prohibition are to be found in the Employers' Liability Acts and the Agricultural Holdings Act. The importance of the decision we are reviewing is that in effect it prohibits contracting out in regard to a statute, which in terms does not prohibit it. The decision, too, raises the question whether our Courts are becoming less careful of preserving the privilege of contracting out than they have hitherto been. Jessel, M. R., in a well-known passage in one of his judgments put the reason for the Court preferring freedom of contract on the ground of public policy. He held that there is a paramount public policy not lightly to interfere with the freedom of contract; this paramount policy must outweigh all except the gravest and most undisputable of lesser public policies to the contrary. "If there is one thing," he said, "which more than another, public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider—you must not interfere lightly with freedom of contract."

The purpose of the law is to impart stability and security to business relationships. The essential nature of the transaction termed "contract" is thus well described by one writer on jurisprudence, Mr. Sheldon Amos:

"In every case of a contract between two persons, one of them, at the least, binds his acts in the future, and the other knows that he does so and directs his own conduct in accordance with that knowledge. For the person so relying upon the other's future action, so much at least of the cloud of uncertainty that ever hangs over the future is lifted. For the vacillation and changeableness of human action and will, the certainty of a sequence is substituted. The person who thus engages to bind his own future may be induced to do so by a variety of different considerations. He may be induced to make the engagement by way of reward for a service already rendered him, or by way of reciprocity as the price of some service done or gift presented at the time, or as the price of some service to be done in the future."

These words reveal the primary and essential importance of contract, namely, security and stability; and a consideration of them will, we think, lead to the conviction that the less interference by the state in the matter the better; rather, encouragement of freedom of contract should be aimed at.

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#### IS THERE A RESURRECTION AT THE BAR?

Mr. J. H. Balfour Browne, K. C., wrote an interesting book entitled, "Forty Years at the Bar." He practiced as a barrister in London at the Parliamentary bar and specialized in compensation-condemnation-cases. What impressed me forcibly while reading this book was the following statement: "I am of the opinion that there is no resurrection at the bar."<sup>1</sup> Browne refers to distinguished practitioners who accepted political preferment and then re-

(1) *Forty Years at the Bar*, p. 169.

turned to, or rather attempted to re-enter active practice; but, in his opinion, success is highly problematical, at least at the British bar.

Recently, the press announced that ex-President Wilson would enter upon the practice of law; and that the legislature of New York had granted him the right to practice in the courts of that state. The State of Washington could not be so generous for our constitution prohibits special legislation. Lawyers cannot be admitted here except as provided by general statute.

The question has often been asked: "What shall we do with our ex-presidents?" As most ex-presidents at the expiration of their term of office have reached the age of sixty years, it would seem that a dignified retirement would be most appropriate after holding that exalted position. The Constitution<sup>2</sup> makes the President the Commander-in-chief of the Army and Navy. An easy solution would be to place him at the end of his service upon the retired list as an army officer and on retirement pay, equal to the president's allowance.

In glancing over the occupants of the presidential chair one is reminded that twenty-two out of twenty-eight were admitted to the bar. Of these, three were lawyers of first rank: John Adams, Abraham Lincoln and Benjamin Harrison. That is, these names would be found in a book of great lawyers, if they had never occupied the presidency. Only one of them returned to practice—Benjamin Harrison. Grover Cleveland was an excellent president, although he did not rank high as a lawyer, but his reputation as an executive has been growing as his administration is being viewed free from party prejudice. After his first term he became a member of a New York firm headed by the late Francis Lynde Stetson. Benjamin Harrison often appeared in court after he left the White House, and distinguished himself by his lawyer-like arguments.

Whether Lincoln was really a great lawyer depends upon the viewpoint; although he has a place in "Great American Lawyers."<sup>3</sup> By the Bar he is regarded rather as a lawyer-orator like Patrick Henry, Henry Clay, Robert G. Ingersoll and Roscoe Conkling; and yet the last was offered the appointment of Chief Justice by President Grant, and Associate Justice by President Arthur, both of which he declined. It is stated that James K. Polk was engaged in the trial of a case before a justice of the peace at Nashville, when notified that he had been nominated for president. That was nothing derogatory to a candidate for the presidency, but if it happened at the present day it would seem somewhat remarkable.

Times have changed in other respects. In 1820 Daniel Webster would charge \$20.00 for an opinion in important cases, and \$100.00 for an annual retainer.<sup>4</sup> Recently a judge in a New York court allowed \$45,000 for preliminary counsel fees in defending an action for divorce. Of course, the defendant was rated as a multimillionaire, and the judge found it easy to be the liberal dispenser of another's money.

There is no doubt, however, that lawyers who abandoned their practice for political office have, as a rule, had difficulty in ever regaining their former prestige at the bar. Webster and Choate were in the senate, but they were continually in court while serving as senators. Matthew H. Carpenter and Roscoe Conkling did the same. In 1893 a receivership case was pending in the United States Circuit Court at Seattle concerning the Northern Pacific Railroad. There was a noted array of counsel present at the hearing. Senators Spooner of Wisconsin, Manderson of Nebraska, Sanders of Montana, and Dolph and Mitchell of Oregon participated in the

(2) Art. 2. Sect. 2.

(3) Vol. 5, p. 461.

(4) Clark's Eminent Lawyers, Vol. 2, p. 857.

argument, although the law phase of the case was more ably presented by other counsel who held no political office.

Congress, no doubt, felt that the appearance of Senators and Representatives in court and before government departments, had a tendency to reflect upon its dignity, enacted a statute on June 11, 1864,<sup>5</sup> prohibiting any of its members from appearing in any cause before the departments. Senator Mitchell was convicted under this statute, as was Senator Burton of Kansas.<sup>6</sup> Like many other enactments this law was regarded obsolete until President Roosevelt urged these prosecutions, which brought the statute into prominence, and it seems to have been strictly observed since. These Senators happened to be the victims of a custom that had been followed for years, but the effect was decisive in eliminating Senators and Representatives from practicing before the departments, and apparently before the courts as well.

Reverting to our theme of resurrection at the bar, there are some noted instances of success which are probably exceptions to prove the rule. In March 1857, the celebrated Dred Scott case was decided by a divided court.<sup>7</sup> Benjamin R. Curtis was one of the ablest judges ever on the Supreme bench. He wrote a dissenting opinion. Later in that case Chief Justice Taney and Justice Curtis became involved in an acrimonious controversy because of changes made by the Chief Justice after filing the original official opinion by inserting eighteen pages to answer the views of Justice Curtis.<sup>8</sup> Justice Curtis resigned after six years of service. Returning to Boston he entered upon a lucrative practice which averaged over \$40,000 a year

for seventeen years.<sup>9</sup> In 1868 he refused the appointment of Attorney General of the United States, and in 1871 declined to act as counsel for this government in the Geneva Arbitration case, because he disliked public office and did not want to neglect his law practice.

Contemporaneous with Curtis in the Supreme Court was John A. Campbell who was appointed in 1852 and resigned in 1861, because he believed a state had a right to secede, and as Alabama seceded, he, of course, followed the fortunes of that commonwealth. Justice Wayne held the contrary view and refused to follow Georgia, but continued on the Supreme bench to 1865. Justice Campbell also wrote a dissenting opinion in the Dred Scott case. After the Civil War he carried on an extensive practice, appearing in the Slaughter House Cases,<sup>10</sup> and many others, as may be seen from an interesting biography of Campbell by Henry G. Connor, United States District Judge in North Carolina. He attained great eminence at the bar, living to March 12, 1889; and had the honor of being the last survivor of the distinguished court over which Chief Justice Taney presided. Had he continued on the Supreme bench to the end of his days he would have served thirty-seven years, a longer time than any Justice of that court. Curtis and Campbell were great jurists and intimate friends. They, however, represented the extreme views on constitutional rights in their day; one as asserted in the North, the other as contended for in the South.

Judge P. Benjamin was a brilliant lawyer. He was a United States Senator but resigned in 1861. He had a very extensive practice in New Orleans, but owing to business reverses he lost most of his property, and the war swept away the re-

(5) Sect. 1782 U. S. Stat. 1901.

(6) *Burton v. U. S.* 196, U. S. 283.

(7) *Scott v. Sanford*, 19 How. 393.

(8) *The Supreme Court*, by Hampton L. Carson, Vol. 2, p. 349.

(9) *Life of Curtis* 268.

(10) 16 Wall. 36, *New Orleans v. Gaines*, 131 U. S. 191.



mainder. He was respectively Attorney General, Secretary of War and of State for the confederacy. Rather than return to Louisiana to practice he determined to seek his fortune in a foreign land, and on January 12, 1866, he was entered at Lincoln's Inn, London, age 55 years, to begin anew a legal career at the bottom of the aristocratic and conservative Bar of England. It should be remembered that Benjamin was born in the Island of St. Thomas, W. I., and therefore, regarded as a British subject, which greatly favored him, so that he was called to the bar in June, 1866. While preparing for admission he wrote "Benjamin on Sales," published in 1868, a classic to this day. He became a Q. C. in 1871, but retired in 1883. His income exceeded \$75,000 a year, which would apparently refute Mr. Browne's assertion that there is no come-back at the bar. However, Judah P. Benjamin was a remarkable exception to the general run of gifted men. Of all the biographies in the eight volumes of "Great American Lawyers," the career of Mr. Benjamin is most fascinating to me, because of his determination, his patience and wonderful industry and perseverance, crowned with unparalleled success as a practitioner, first at the American and then at the British bar. His professional life should serve as a constant inspiration for lawyers at all times.

The Pacific Northwest embraces a territory larger than the original thirteen states, and in potential wealth and resources surpasses imagination; yet we have never had representation in the United States Supreme Court. George H. Williams was probably the greatest lawyer this region ever produced. He was admitted to the bar in Iowa in 1844, and was Chief Justice of Oregon Territory in 1853; later a United States Senator from that state. Then he became Attorney General under President Grant, who nominated him for Chief Justice of the Supreme Court in 1874 to succeed Salmon P. Chase. It seems that Mrs.

Williams was diplomatically speaking, *persona non grata* to the women of the Supreme Court circle, consequently the nomination was not confirmed. He returned to Portland, Oregon, and practiced law very successfully until he died in 1910. Had he been confirmed and served to the time of his death he would have exceeded John Marshall in length of service as Chief Justice as well as every other member of that court.

From what has been stated it may be concluded that there is "a resurrection at the bar," both in this country and in England, but there is no doubt that it takes extraordinary perseverance and unusual ability to break the rule. Generally speaking, ex-congressmen and other governmental officials of high rank have great difficulty in regaining prestige in a most exacting profession—the law. The really great lawyers like Charles O'Connor, Jeremiah S. Black, Reverdy Johnson, David Dudley Field and many others have held aloof from a political career. In England it is the unwritten law that a Lord Chancellor or a Lord Chief Justice never returns to the bar as a practitioner.<sup>11</sup> Lord Erskine chafed under this restriction, for he lived sixteen years after leaving the woolsack, and longed to re-enter the arena of forensic practice, where he had won undying fame as the most eloquent and fearless British advocate.

As to Mr. Wilson, every member of the legal fraternity will consider it flattering to our profession that an ex-president after serving this great nation for eight years should have the desire and ambition to be again enrolled as an ordinary member of our bar; and as such every lawyer will wish him the best of health and, what is most gratifying to any of us—well-merited success.

FRED H. PETERSON.

Seattle, Wash.

(11) Vol. 1 Erskine's Speeches, p. 18.

NEGLIGENCE — LIABILITY OF WATER  
COMPANY.

TRUSTEES OF JENNIE DEPAUW MEMORIAL METHODIST EPISCOPAL CHURCH v. NEW ALBANY WATERWORKS.

130 N. E. 327.

(Appellate Court of Indiana, Division No. 2.  
April 21, 1921.)

A water company which had agreed in its contract with city to keep fire hydrants in repair and furnish sufficient water to put out fires, but which surrendered its franchise from the city and received in lieu thereof an indeterminate permit as provided in Acts 1913, p. 167, § 101 (Burns' Ann. St. 1914, § 10052x3), was liable to a church under Public Service Act, §§ 7 and 116, for loss by fire occasioned by defective condition of a fire hydrant, which condition existed by reason of the water company's negligent failure to keep it in proper order, the word "injured" in the last-named section meaning any wrong or damage done to a man's person, rights, reputation, or goods, including privation of a legal right; and such section created a liability in favor of the individual injured which did not theretofore exist.

NICHOLS, J. Action by appellant against appellee to recover for the loss and damage sustained by appellant on account of fire resulting from appellee's negligence. The complaint was in two paragraphs to each of which a demurrer was sustained. Appellant refused to plead further and elected to stand upon the complaint, and judgment was rendered against appellant for costs. From this judgment, this appeal.

The substantial averments of the complaint, so far as herein involved, are as follows: Appellant was on December 20, 1917, the owner of certain real estate in the city of New Albany, Floyd county, Ind., upon which was situated a stone church, the property of appellant, of the reasonable value of \$20,000. In such church appellant had personal property of the total value of \$4,000. Appellee at said time owned and operated, and for 14 years theretofore had owned and operated, in said city a system of waterworks for the purposes of supplying said city and its hydrants with water for fire protection, and for municipal and domestic purposes. On August 25, 1904, appellee entered into a certain contract in the nature of a franchise with said city, by the terms of which appellee was permitted and authorized to erect and maintain in said city its said waterworks

for the purposes aforesaid, by which said contract appellee agreed to furnish an adequate supply of water to said city for protection of the property of said city and its inhabitants against fire. The contract covered a period of 25 years. It provided that appellee should furnish at its own cost and expense 200 fire hydrants at points then located, or to be thereafter located, by the city. Such hydrants were to be kept in good order and working condition, and were to be used by said city through its fire department for the purposes of extinguishing fires in said city. Such water system was to be so constructed and the hydrants kept in such condition that during the prevalence of fire the water supply should be sufficient for the purposes of extinguishing such fires. The city agreed to pay the said company for such purposes the sum of \$60 per annum for the first 200 hydrants and \$50 per annum for each additional hydrant over 200; the funds for such purposes to be paid out of the public revenue of such city raised by taxation of the property of said city and otherwise. After such contract was entered into, appellee did maintain in said city its system of waterworks in such contract provided for, and for the purposes therein contemplated. One of said hydrants was located on Vincennes street in said city and immediately in front of appellant's said property, which said hydrant was the nearest fire hydrant to said property. Appellee maintained said system under the terms of said contract for the purposes therein contemplated until June 25, 1917; its only right to maintain said waterworks being under the terms of said contract. On said June 25, 1917, pursuant to the provisions of section 101 of the act of the General Assembly concerning public utilities, approved March 4, 1913 (see Acts 1913, p. 167; section 10052x3, Burns' R. S. 1914), appellee filed with the clerk of said city, and with the Public Service Commission of Indiana, a written declaration legally adopted and executed by appellee to the effect that it surrendered said franchise so received from said city as aforesaid, and that it received by operation of law in lieu thereof an indeterminate permit as provided for in said act, and appellee did so surrender its franchise as aforesaid, and since June 25, 1917, appellee has been operating its water system in said city, and furnishing water to said city and its inhabitants for the purposes aforesaid, and has been maintaining its fire hydrants, including the said fire hydrant in front of appellant's property, all under its said permit. Said city has during all of said time maintained its fire department adequately equipped for the pur-

poses of fighting and extinguishing fires occurring in said city with water so contracted to be furnished to such city by appellee from the hydrants aforesaid. Said hydrant in front of appellant's property was so located that the hose of such department could be attached to it, and in a few seconds' time water could be thrown in or on any fire that might occur in appellant's property, and such fire extinguished, if such hydrant had been maintained in proper repair and working condition. But on said December 30, 1917, in violation of said indeterminate permit, appellee did not furnish reasonably adequate service and facilities, in this, that it negligently and carelessly suffered and permitted the said fire hydrant to become out of order and repair, and that water would not flow through it into the hose of the fire department, and that said hydrant could not be turned on or opened so that water would flow from the mains into the hose when attached thereto. Immediately upon the occurrence of the fire the fire department was notified and responded with the necessary hose and apparatus for extinguishing such fire, and attached its hose to said hydrant and attempted to open the same, and to obtain water therefrom, but was unable so to obtain it, and for that reason to extinguish the fire. At said time the fire was still in its incipency, and could and would have been extinguished except for the defective condition of the hydrant aforesaid. Said building and its contents were totally destroyed, to the appellant's damage in the sum of \$25,000, solely by the negligence of appellee as aforesaid.

Each of the rulings on said demurrers present the same questions so far as this appeal is concerned, and it is therefore unnecessary to set out the substance of the second paragraph of complaint.

It is to be observed that prior to June 25, 1917, being the date when appellee surrendered its franchise to said city and received its indeterminate permit to operate under the Public Utilities Act, appellee had been furnishing water to said city and to its inhabitants for fire protection under the terms and stipulations of such franchise, and that after it was granted such indeterminate permit it continued to furnish such service under the provisions of said Public Utilities Act, and that it has been acting and furnishing water to said city and its inhabitants for said purposes under said permit since June 25, 1917, and that it was so acting under said permit at the time of the fire here involved. Appellant conceded that under the common law as interpreted by the Supreme

Court of this state, as well as by the court of other jurisdictions, there was no liability to the individual citizen of the municipality, for the reason that there was no privity of relation between such citizen and such public service corporation. Appellant cites *Fitch v. Seymour Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258, as an authority sustaining this proposition against appellant, and appellee relies upon such authority, together with many others both in and out of the state, which it cites. It is therefore taken for granted that the question of the common-law liability is not involved in this action, and appellant's liability, if any, must be determined by an examination and interpretation of the provisions of the Public Service Act. Acts 1913, p. 167; Burns' R. S. 1914, § 10052a et seq.

Section 101 of said act provides:

"Any public utility operating under an existing license, permit or franchise shall, upon filing at any time prior to the expiration of such license, permit or franchise and prior to July 1, 1915, with the clerk of the municipality which granted such franchise and with the Commission, a written declaration, legally executed, that it surrenders such license, permit or franchise, receive by operation of law, in lieu thereof an indeterminate permit as provided in this act, and such public utility shall hold such permit under all the terms, conditions and limitations of this act."

Section 7 of such act provides that every public utility is required to furnish reasonably adequate service and facilities.

Section 116 thereof provides:

"If any public utility shall do or cause to be done or permit to be done any matter, act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by this act such public utility shall be liable to the person, firm or corporation injured thereby in the amount of damages sustained in consequence of such violation."

Section 110 thereof provides that the municipality shall have the power to determine by contract, ordinance, or otherwise the quality and character of the service to be furnished or rendered by the public utility furnishing such service and the terms and conditions not inconsistent with the Public Service Act. It does not appear, however, by the complaint that any change was made in the kind and quality of service to be rendered after the surrender of the franchise and the granting of the indeterminate permit.

It will be observed that the hydrant here involved had been located immediately across the street from appellant's property during the time that appellee was operating under its franchise with said city, and that the same continued to remain in such location to the time

of the fire. It is averred in the complaint that such hydrant was out of order and repair because of the negligence and carelessness of appellee, and for that reason water would not flow from the mains through it into the fire department's hose, and that such negligence thereby resulted in the damages complained of by appellant.

It must be kept in mind that appellee after June 25, 1917, was not rendering service to the city of New Albany and its inhabitants for fire protection and otherwise under the franchise of said city which it theretofore held, but that it was furnishing such service thereafter wholly under the terms and conditions of the Public Utilities Act, and subject to the duties and liabilities imposed by such act.

It is contended by appellee that the Public Service Law does not provide for any liability of a public utility that did not exist prior to its enactment, while it is contended by appellant that by the passage of said act Indiana has fundamentally changed the law governing public service corporations, and that under such act the management and control of such corporations has been taken over by the state, and by statutory enactment the state has determined the obligations, duties, rights, and liabilities of such corporations, not only to the state and the municipality in which they operate, but to the general public and the individual intended to be served by such public service corporation, and that by such enactment a liability has been created where none theretofore existed.

Reading section 7 and section 116, referred to above, we have the express provision that every public utility is required to furnish reasonably adequate service and facilities, and that, failing and omitting so to do, such public utility shall be liable to the person, firm, or corporation injured thereby for the amount of damages sustained consequential to such violation. Recognizing, as we must, that before the passage of such Public Service Act there was no liability on the part of the public service utility to an inhabitant of a city within which such corporation was operating under a franchise for injuries suffered by such inhabitant because of the negligent acts of such public service utility, we are wholly unable to interpret the sections aforesaid of the Public Service Act so as to make them simply an enactment of the common-law principle theretofore established, and by such interpretation thereby make the provisions aforesaid an absolute nullity. By the use of language so plain of understanding and so easy of interpretation,

we must hold that the Legislature intended thereby to change the law so as to create a liability that did not theretofore exist, and it has created a liability in favor of the individual injured because of the negligence of such public service utility in failing to furnish reasonably adequate service of water for fire protection.

Sections 7 and 116 of the Public Service Act, the provisions of which are given above, are substantially copied from corresponding sections of the Public Service Act of the state of Wisconsin, except that the section of the Wisconsin act corresponding to section 116 of the Indiana act provides for treble damages.

On February 28, 1913, the Wisconsin Supreme Court, in the case of *Krom v. Antigo Gas Co.*, 154 Wis. 528, 140 N. W. 41, places upon the section corresponding to said section 116 of the Indiana act a construction to the effect that the treble damage feature of such section indicated that the section was intended to be penal, and hence covered only willful breaches of duty, or, as expressed in the case of *Cohn v. Neeves*, 40 Wis. 393, a breach in which there is some element of willfulness, wantonness, or evil design. It will be observed that the Indiana act omits the word "treble," thereby making the trespassing corporation liable to the person, firm or corporation injured only in the amount of damages sustained in consequence of its violation of the law. The time intervening between the date that this decision was handed down by the Wisconsin Supreme Court and the date of the approval of the Public Service Act of Indiana is so short that it is questionable as to whether such decision was of controlling force in inducing the change that was made in the Indiana statute. Whether such was the case or not, we think it apparent that the change in the Indiana statute was such as to take out of it the punitive element making the liability of the trespassing corporation for compensatory damages only. Though such section of the Wisconsin act was by such decision held to be punitive, and therefore only applying to cases of willful injury, and such holding is for the Wisconsin court, we hold that the change in such section as enacted by the Indiana Legislature is such as to extend the liability of the public service corporation to injuries resulting from its negligence, and the question of its negligence in a particular case is one of fact for the jury. After re-argument the opinion in the case of *Krom v. Antigo Gas Co.*, supra, was modified, and the modified opinion is reported in 154 Wis. 528, 143 N. W. 163. In such modified opinion the court says that



it is not convinced of error in the result which was reached in the first opinion, but is convinced of its error in some of the reasoning by which it reached such result. In the second opinion the court says that in the first opinion the word "injury" was said to carry no necessary implication of actionable wrong, while in the modified opinion the court says that—

"The word 'injure' in its accurate and technical legal sense means to violate a legal right of another, or, what amounts to the same thing, to inflict an actionable wrong. \* \* \* Now, if the word 'injured' is used in its accurate legal sense \* \* \* then no new liability is created by that section (except the liability for treble damages instead of single damages)."

We have thus quoted from the modified opinion of the Wisconsin decision for the purpose of showing the process of reasoning by which the court in the modified opinion reached the conclusion that the section involved created no new liability except for treble damages. We deem it unnecessary further to discuss such modified opinion, except to suggest the probability that the influence that was controlling therein was, as expressed, to the effect that immense sums had been invested in public utilities of this nature in undoubted reliance upon the common-law principle of non-liability, and that tremendous liabilities would be imposed on water companies and cities operating their own plant as well, if the law were construed as the plaintiff contended that it should be construed.

In the case of *Boyer v. State*, 169 Ind. 691, 83 N. E. 350, it was held that, when there is nothing in the act itself to indicate that the word or phrase is used in a particular or technical sense, it will be construed in its ordinary and popular meaning, unless the result would be to defeat the legislative intent. "Injury" means, in general any wrong or damage done to a man's person, rights, reputation or goods. "Injured," in its plain, ordinary, and usual sense, signifies privation of a legal right. *Jordan v. State*, 142 Ind. 422, 427, 41 N. E. 817. These definitions answer our purpose in this case. Certainly appellants had a legal right to fire protection.

The ordinary legislator, whether he be a carpenter or miner, farmer or merchant, lawyer or judge, whatever may be his business or occupation, would certainly have no difficulty in understanding the plain, ordinary meaning of the section of the statute which says that—

"If any public utility \* \* \* shall omit to do any act, matter or thing required to be done by this act such public service utility

shall be liable to the person, firm or corporation injured thereby in the amount of damages sustained in consequence of such violation."

The language is so plain that it needs no interpretation, and, when such public utility negligently fails to furnish reasonable and adequate service and facilities for protection against fire, its liability must be measured by the plain, ordinary language of said section above quoted. We hold that it was error to sustain the respective demurrers to the several paragraphs of the complaint, and the judgment is therefore reversed, with instructions to the trial court to overrule each of such demurrers and for further proceedings.

NOTE.—*Liability of Water Company for Loss by Fire Due to Inadequate Supply or Facilities.*—

Aside from statutory provision creating such liability, it is held that there is no liability on the part of a water company, under contract with a city to furnish water for a waterworks system, for fire losses due to lack of or insufficient water supply. This rule applies to a city which has undertaken to protect against fires by installing waterworks system and a fire department. *Concordia Fire Ins. Co. v. Simmons Co.*, Wis., 168 N. W. 199; *McQuillin*, Mun. Corp., § 2680.

"In the creation of a system of waterworks and the operation of the same for the purpose of protection against fire, flushing sewers, and other uses pertaining to the public health and safety, the city is in the exercise of the police power and is therefore exercising a governmental function." *Eastern Ill. State Normal v. Charleston*, 271 Ill. 602, 111 N. E. 573; *McQuillin*, Mun. Corp., § 2625.

In North Carolina, however, we find the following: "Where a citizen of a town has brought suit against the receiver of a water company for the alleged negligent failure of the water company to supply water under its contract with the city, by reason of which the plaintiff sustained loss by fire, and the plaintiff has collected moneys due under his policies with certain insurance companies on the same building insufficient to pay the damages he has sustained, and it appears that the receiver has sufficient funds. Held, the insurance companies subrogated to the rights of the insured, and in this case the order of the Superior Court is sustained, that the insurance companies have made out a *prima facie* case against the receiver of the insolvent water company, and that they be permitted to sue him." *Powell v. Wake Water Co.*, 171 N. C. 290, 88 S. E. 426.

## BOOK RECEIVED.

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## HUMOR OF THE LAW.

"I claim that congressmen are paid more than they're worth."

"How much are they paid?"

"I don't know."—*Nashville Tennessean*.

A lawyer, in some ways grass green,  
Quite incautiously filled his machine

By the light of a lamp

Where the breezes did ramp,

Since which time he has never benzine.

"How did Dubbs become a millionaire so quickly?"

"He's an importer."

"From Europe?"

"Nope, from Canada."—*American Legion Weekly*.

An attorney was examining a witness concerning the character of the dead man connected with the case, and the witness said:

"He was a man without blame, beloved and respected by all, pure in all his thoughts, and—"

"How did you learn all that?" interrupted the judge.

"I read it on his tombstone," the witness replied.

Willie. Paw, can you name six noted legislative bodies?

Paw. Well, there's the American Congress and the British Parliament and the French Chamber of Deputies and the German Reichstag and the Japanese Diet, my son.

Willie. But that's only five, and the teacher want us to name six.

Paw. Well, there's the—er—er—the Hungarian Goulash. Now, don't bother me. Can't you see I'm reading?—*Brooklyn Eagle*.

The youthful Lord Chancellor of England, in a recent case, admitted that neither he nor the House of Lords assumed to know all the law and must depend largely on the researches of counsel. Law Notes (London) has a poetical brainstorm over the incident with the following result:

When I went to the Bar as a very young man,

(Said I to myself—said I),

I'll master the law if any one can

(Said I to myself—said I)!

During an address to a body of law students, ex-President Taft pointed out that too much care cannot be taken in the selection of the jury. And in this connection he told of an intelligent looking farmer who had been examined by both defense and prosecution and was about to be accepted when the prosecutor chanced to ask:

"Do you believe in capital punishment?"

The farmer hemmed and hawed and after a moment's reflection replied:

"Yes, sir; I do, if it ain't too severe."—*St. Louis Star*.

One speaker had taken up nearly all the time assigned to three speakers. The first speaker to follow the long-winded one said:

"Mr. Longwynde's speech reminds me of the man who used to become spifficated and then buy his wife a present to take home as a peace offering. These purchases, being made while the man was under the befuddling influence, were sometimes wonders of eccentricity. On one occasion he took home a whole bolt of cheesecloth, saying: 'Jush lookit that, honey, wottigotchy!'"

"The wife looked at the goods, unrolled a bit of it and said:

"'Why it's so thin, it's of no use!'"

"'Yes,' said the intoxicated husband, 'but jush lookit how nice an' long it is!'"

## WEEKLY DIGEST.

**Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.**

*Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.*

Alabama.....	16, 18, 30, 57, 62
California.....	11
Georgia.....	10, 46, 47, 54
Idaho.....	21
Illinois.....	58, 66
Indiana.....	12, 38
Iowa.....	41, 55
Kentucky.....	29, 50
Louisiana.....	2
Maine.....	13, 52, 68
Maryland.....	33, 60
Massachusetts.....	19, 25
Michigan.....	23, 37, 39, 43, 56
Minnesota.....	63
Missouri.....	17, 42, 53
New York.....	3, 8, 9, 20, 26, 44, 48, 51
North Carolina.....	15, 45, 65, 67
Oklahoma.....	40
Oregon.....	24
Texas.....	14, 31, 32, 34
United States C. C. A.....	1, 7, 22, 35, 49, 61
United States D. C.....	4, 5, 6
Virginia.....	27, 28, 59
Washington.....	36, 64

1. **Attachment**—Action for Tort.—Under Burns' Ann. St. Ind. 1914, § 947, authorizing attachments in "actions for the recovery of money," an attachment is authorized in tort actions for damages.—Shedd v. Calumet Const. Co., U. S. C. C. A., 270 Fed. 942.

2. **Attorney and Client**—Conveyance to Attorney.—Recording of a conveyance to an attorney of an interest in mineral rights, in consideration of his services to be rendered in protecting those rights, protects the interest of the attorney against a subsequent conveyance to the adverse party without his giving notice to the adverse party under Act No. 124 of 1906, relating to perfecting lien of attorneys, since the conveyance to the attorney was a present one, operative under registry laws regardless of lien statute.—McClung v. Atlas Oil Co., La., 87 So. 515.

3. **Disbarment**.—Under Judiciary Law, § 88, subd. 3, and section 477, an attorney convicted of a violation of Criminal Code U. S. § 37 (U. S. Comp. St. § 10201), by conspiring to defraud the United States by hindering and delaying it in seizing title to an indebtedness to the Imperial German government during the war, a felony under Criminal Code U. S. § 335 (U. S. Comp. St. § 10509), must be disbarred, the provisions of the Judiciary Law being mandatory, subject to application for vacation of the order of disbarment if the conviction is reversed on appeal.—In re Lindhelm, N. Y., 187 N. Y. S. 211.

4. **Fraudulent Opinion**.—An opinion furnished prospective purchasers of land by attorneys held fraudulent, in the specific false statements as to the attorneys' opinion respecting the title, in the false inference intended to be thereby conveyed, and in essential matters concealed and withheld, which it was their duty to disclose.—Goodrich Lockhart Co. v. Sears, U. S. D. C., 270 Fed. 971.

5. **Bankruptcy**—Conditional Sale.—Under the law of Pennsylvania and Bankruptcy Act, § 47a (2), as amended by Act June 25, 1910, which vests a trustee with all the rights of a creditor

holding a lien by legal or equitable proceedings, property held by a bankrupt under a conditional sale contract, and passing into the hands of his receiver, cannot be reclaimed by the seller.—In re Mina, U. S. D. C., 270 Fed. 969.

6. **Settlement Under Lease**.—Where bankrupt, on leasing premises for a term at \$75 per month, paid the landlord \$225 as security for his performance of the contract, which sum, in his payment of rent to within 3 months of expiration of the term, was to be applied in payment of the remaining rent, and on the bankruptcy and vacation of the premises by the receiver the landlord accepted possession and rented to others, the receiver held entitled to recover the \$225, less the rent due to the time he surrendered possession.—In re Tanory, U. S. D. C., 270 Fed. 872.

7. **Statute of Waste**.—The New Jersey statute of waste, as construed by the courts of the state, while giving a remedy by an action on the case in the nature of waste founded on tort against certain classes of tenants, does not destroy the remedy by an action for waste founded on a covenant contained in the lease, and the judgment in such an action, although the claim was unliquidated at the time of the commission of an act of bankruptcy by the defendant, is provable under Bankruptcy Act, § 63a (Comp. St. § 9647(a)), and may be made the basis of a petition in bankruptcy.—In re Standard Aero Corporation of New York, U. S. C. C. A., 270 Fed. 779.

8. **Banks and Banking**—Cable Transmission.—Where national bank advertised that it sent money to Poland by cable at the "lowest prices," with "perfect security and speed guaranteed," and plaintiff paid \$120 to the bank for cable transmission to Poland, an additional charge of \$5 being made for a reply cable, he being orally told that in case of nonproduction of a receipt in three weeks the whole amount paid would be refunded, and it appeared that the money did not reach its destination, in an action by plaintiff to recover the money so paid, held, that plaintiff was entitled to recover the full amount paid.—Wasserman v. Irving Nat. Bank, N. Y., 187 N. Y. S. 243.

9. **Dishonored Check**.—In depositor's action against bank for injury to credit from dishonor of checks, it was no defense that the bank's subordinates in dishonoring the checks had violated instructions.—Wildenberger v. Ridgewood Nat. Bank, N. Y., 130 N. E. 609.

10. **Note of Insolvent Bank**.—An insolvent bank in the hands of a receiver was liable on notes executed by officers of the insolvent bank, payable to such bank, indorsed by it, and assigned to another bank for a valuable consideration.—Henderson v. Citizens' First Nat. Bank, Ga., 106 S. E. 549.

11. **Ultra Vires**.—In lessor's action to recover premises leased to defendant's predecessor, held, that defendant bank could not, in view of Civ. Code, § 354, subd. 4, and the banking law, plead ultra vires as a defense against the recovery of rent on the ground that the bank did not have the right to operate a moving picture show, inasmuch as it could lawfully assume a lease, even though its use of the property might be ultra vires.—Chambers v. Security Commercial & Savings Bank, Cal., 196 Pac. 488.

12. **Bills and Notes**—Demand.—Where a demand note is payable generally and not at any particular place, no demand is necessary before commencing suit; the commencement of suit being a sufficient demand.—Arnott v. McClintock-Turnkey Co., Ind., 130 N. E. 436.

13. **Blasphemy**—What Constitutes Offense St. c. 126, § 30, may be committed either by using profanely insolent and reproachful language against God, or by contumeliously reproaching Him, His creation, government, final judgment of the world, Jesus Christ, the Holy Ghost, or the Holy Scriptures as contained in the canonical books of the Old and New Testament, or by exposing any of these enumerated Beings or Scriptures to contempt and ridicule,

and it is not necessary for the state to prove the doing of all of them.—*State v. Mockus, Me.*, 113 Atl. 38.

14. **Broker's—Dual Relation.**—In broker's action against vendor for commission, failure of evidence to show plaintiff's bad faith or actual loss to his principal, flowing from his acceptance of compensation from the purchaser, does not prevent plaintiff's forfeiture of the agreed commission, since forfeiture follows the mere existence of the undisclosed dual relation, as the exaction of a sound public policy.—*Paul v. Prince, Tex.*, 228 S. W. 1102.

15. **Carriers of Passengers—Assault.**—Custom not to open ticket window until 15 minutes before scheduled time for train, while evidential, was not controlling on question whether a person entering the station before such time and within a reasonable time before the departure of the train was a passenger in an action against the railroad for assault and battery.—*Clark v. Bland, N. C.*, 130 S. E. 491.

16. **Correct Time.**—A railroad was under no duty to furnish a clock in its waiting room for use of passengers at station, but, having undertaken to inform passengers the time by means of a clock in the waiting room, it was required to exercise due care in the maintenance thereof so that passengers would not miss train by reason of the clock being slow.—*Louisville & N. R. Co. v. Clark, Ala.*, 87 So. 676.

17. **Degree of Care.**—It is the duty of the operatives of a street car approaching a railroad crossing to use the highest degree of care to ascertain if there is any train closely approaching the crossing, to prevent injury to passengers on the street car.—*Bergfeld v. Dunham, Mo.*, 228 S. W. 891.

18. **Degree of Care.**—An instruction that "the degree of care that a carrier is required to take of a passenger does not mean that every possible or conceivable care and precaution which might increase or even assure the safety of the passenger must be taken, but only such care as is reasonably practicable under the circumstances," is misleading when standing alone, though it might be sanctioned if elucidated by definition of due diligence.—*Louisville & N. R. Co. v. Holmes, Ala.*, 87 So. 574.

19. **Negligence.**—A railroad passenger, arriving at the station of her destination, was entitled to the rights of a passenger while carefully leaving the train and platform.—*Aldrich v. Boston & M. R. R., Mass.*, 130 N. E. 482.

20. **Charities.**—Request to Fire Suppression Corporation.—Request to corporation organized under Laws 1873, c. 397, to aid in the suppression of fires in certain village held a charitable bequest in the broader sense of the term.—*Sherman v. Richmond Hose Co. No. 2, N. Y.*, 130 N. E. 613.

21. **Covenants.**—Recovery on Warranty.—The right of the vendee to recover on such warranty is not waived by going into possession of the land, with knowledge that the soil is impregnated with alkali to the extent mentioned in the warranty, or by cultivating the land or by making a cropping contract in regard to it.—*Wilson v. Sunnyside Orchard Co., Idaho*, 196 Pac. 302.

22. **Customs Duties.**—Opium Not Merchandise.—Under Comp. St. §§ 8800, 8801, prohibiting the importation of opium prepared for smoking, such opium is not "merchandise," as defined by Rev. St. § 2766 (Comp. St. § 5462), since it cannot be lawfully imported, and therefore the master of a vessel is not liable for the penalty imposed by Rev. St. § 2809 (Comp. St. § 5506) on merchandise brought into the country without being shown on the vessel's manifest; the words "brought into," as used in section 2809, not having the effect of enlarging the definition of merchandise, contained in section 2766.—*United States v. Sischo, U. S. C. C. A.*, 270 Fed. 958.

23. **Divorce.**—Clean Hands.—Where plaintiff sued his wife for a divorce because she was

addicted to the use of intoxicating liquors, which his own testimony shows that he knew before he married her, and also shows that he was so addicted to the use of liquor that he not only attempted suicide, but took treatments to get rid of the liquor habit, held, that the bill must be dismissed, because plaintiff had not come into court with clean hands.—*Gill v. Gill, Mich.*, 181 N. W. 996.

24. **Cruel Treatment.**—For a husband, two days after death of daughter, and when wife was ill, with a temperature of 103, to go to her room and abuse and criticize her and precipitate a family row about the wording of a telegram to him telling him of daughter's sickness, held cruel and inhuman treatment.—*Hamilton v. Hamilton, Ore.*, 196 Pac. 472.

25. **Electricity.**—Due Care.—An electric illuminating company, having placed its conduit in a public way, was bound thereafter to use due care in its maintenance, not only under the conditions of travel existing when the conduit was built, but coming into existence afterwards, whether by resurfacing or paving of the street, or the establishment of a car track.—*Nugent v. Boston Consol. Gas Co., Mass.*, 130 N. E. 488.

26. **Eminent Domain.**—Change of Grade.—Owner damaged by change of grade entitled to interest from time of change to time of payment.—*Crane v. Craig, N. Y.*, 130 N. E. 609.

27. **Public Use.**—Acts 1916, c. 71, in so far as it amends Acts 1906, c. 194 (Code 1919, § 3065, par. 2), authorizing city in street opening proceedings to acquire land in excess of that required and to replat and dispose of the excess in such manner as it may see fit, where such land is injuriously affected by the taking of a portion thereof for street purposes, held unconstitutional; the taking of such excess portion of the land not being for a "public use" within the Constitution limiting the taking or damaging of private property to a "public use."—*City of Richmond v. Carneal, Va.*, 106 S. E. 403.

28. **Estoppel.**—Additional Service.—Where a light and power company operating under a franchise covering night service had for more than 10 years also furnished day service, such fact held not to estop the company from denying that the franchise covered day service also, and the police power of the state as exercised through the State Corporation Commission could not be ousted by such an estoppel in pais operating on the parties.—*City of Clifton Forge v. Virginia-Western Power Co., Va.*, 106 S. E. 400.

29. **Judicial Sale.**—Where purchasers of lots sold separately at judicial sale were immediately informed by the commissioner that he would proceed to sell the lots together to which the parties' attorneys consented, although the judgment through error did not so provide and purchasers did not object, but one of them, for himself and the others, bid for the property as a whole, running up the price, and the curator of the defendant bid in the property, purchaser is estopped by his conduct from claiming title under the separate sale.—*Crawley v. Manion, Ky.*, 228 S. W. 1032.

30. **Evidence.**—Res Gestae.—A verbal lease, consummated on Sunday was void, under Code 1907, § 3346, but was admissible in an unlawful detainer action when undisputed, to prove the character and quality of defendant's possession of the premises, and the relations between defendant and plaintiff, and the intent of the parties, on the theory that its declarations or admissions formed a part of the res gestae of the parties' acts.—*Eddins v. Galloway Coal Co., Ala.*, 87 So. 557.

31. **False Pretenses.**—Knowledge of Fraud.—Defendant, charged with swindling by selling an 85-cent time check for \$84.15, was not guilty if the prosecuting witness knew, when he parted with his money, that the check given him was for only 85 cents.—*Scott v. State, Tex.*, 228 S. W. 1099.

32. **Homestead.**—Community Property.—Wife is not a necessary party to an action against



husband to try the title to, affect an interest in, or foreclose a lien on community real estate, and in determining whether the wife's homestead interest alone renders her a necessary party to an action effecting property impressed with the homestead exemption, the test is whether the plea of homestead would in itself be a defense to the suit.—*Cooley v. Miller*, Tex., 228 S. W. 1085.

33. **Husband and Wife**—Agency of Necessity.—Where the husband and wife were separated and he was paying for her support, either as alimony under court order or in accordance with an agreement between them fixing such amount as adequate and satisfactory, the wife cannot pledge her husband's credit under the presumed authority of an agency of necessity.—*McFerren v. Goldsmith-Stern Co.*, Md., 113 Atl. 107.

34. **Infants**—Information and Complaint.—Counts in information and complaint charging a felony were ineffective under the Juvenile Act where they did not specify that the party against whom they were filed was under 17 years of age.—*Gordon v. State*, Tex., 228 S. W. 1095.

35. **Insurance**—"Accidental Death."—There is a distinction between accidental death which may be an unexpected or unintentional result of a voluntary act, and death from accidental means, which must result from some unforeseen or unintended act.—*United States Fidelity & Guaranty Co. v. Blum*, U. S. C. C. A., 270 Fed. 947.

36.—**Proof of Loss**.—Though a fire policy provided that no condition could be waived unless such waiver was written upon or attached thereto, yet where the agents of the insurance company misled the insured, who furnished a written statement of his loss, into believing that no further proof was necessary, the insurance company cannot take advantage of the wrong, though it was that of its local agent and adjuster.—*Walton v. American Cent. Ins. Co. of St. Louis*, Wash., 196 Pac. 588.

37.—**Surety Bond**.—A bond given general agents for an insurance company by a soliciting agent the condition of which was that the soliciting agent should faithfully perform his duties as agent, account for and pay over all money received for the general agents or the company, and pay and discharge all indebtedness to the general agents and the company, did not impose on the sureties liability for monies advanced to the soliciting agent by the general agents for living expenses.—*Utter v. Leach*, Mich., 181 N. W. 999.

38.—**Windstorm**.—A policy, agreeing to make good all immediate loss or damage to the property insured which should happen by windstorm, cyclone, and tornadoes, covered loss of a horse secured in the barn, when, terrified by the blowing in of a door, the horse broke its halter and forced its hind foot through the rear part of the stable, so that it could not extricate itself, and was injured so that it died from the injuries and exhaustion.—*Fidelity Phenix Fire Ins. Co. v. Anderson*, Ind., 130 N. E. 419.

39. **Intoxicating Liquors**—Incomplete Process.—Law against "manufacture" of whiskey violated, although process not completed.—*People v. Nanninga*, Mich., 181 N. W. 1014.

40.—**Reputation of Place**.—In a prosecution for maintaining a liquor nuisance and in prosecutions for the unlawful possession of intoxicating liquors with intent to sell, evidence of the general reputation of the place where such liquors are found is admissible in the first class of cases and under certain circumstances in the second class, provided the place be one of general resort or a public place fitted in the manner suitable to a liquor saloon.—*Tindell v. State*, Okla., 196 Pac. 555.

41. **Judgment**—Fraudulent Warrant of Attorney.—If a warrant of attorney in a promissory note was procured by fraud and false representations, it must necessarily follow that a judgment entered thereon solely by virtue of

said warrant was without jurisdiction and void, and the validity of such judgments may be thus attacked in action thereon in another state.—*Ashby v. Manley*, Iowa, 181 N. W. 869.

42.—**Specific Allegation**.—The failure of the petition on an insurance policy to allege specifically that defendant was a corporation, though that fact was apparent from the face of the petition, does not make the petition so defective as to render the default judgment a nullity, where any defect in the service of summons, with which that allegation alone had to do, was waived by general appearance.—*Brown v. British Dominions General Ins. Co.*, Mo., 228 S. W. 883.

43. **Landlord and Tenant**—Countermand of Order.—An order by landlord to tenant to vacate premises and a notice from tenant to landlord that he would do so did not constitute an eviction where landlord countermanded the order to vacate before tenant had moved.—*Lawrence v. Rapaport*, Mich., 181 N. W. 1011.

44.—**Right of Recovery**.—A landlord has no vested or contractual property right in any particular form of remedy for the recovery of his property so long as he is permitted effectively to recover possession of the property.—*People v. La Petra*, N. Y., 130 N. E. 601.

45. **Libel and Slander**—Ineffectiveness.—That plaintiff's standing in the community had not been impaired by defendants' conduct, and that plaintiff could still show a good character, held not to exonerate defendants from their wrongful purpose, as this might tend to show a smaller injury actually sustained, but a greater damage really intended, and the malice, ill will, and spite of defendants were not per se reduced or mitigated by the meager results accomplished.—*Cotton v. Fisheries Products Co.*, N. C., 130 S. E. 487.

46. **Life Estates**—Security.—Money, etc., should not be intrusted to life tenant without security, unless will so provides; life tenant held not entitled to possession without security, though remaindermen joined in her petition.—*Barmore v. Gilbert*, Ga., 106 S. E. 269.

47. **Mandamus**—Sheriff as Stakeholder.—Where the parties to an attachment suit agreed that the constable should sell the property and deliver the proceeds to the sheriff, to be held until final disposition of the case, the sheriff held the fund as a mere stakeholder, and, it not being his official duty to accept a replevy bond and pay over the fund to the defendant, he could not be required to do so by mandamus, under Civ. Code 1910, § 5440, authorizing mandamus to compel performance of official duties.—*Hill v. Nixon*, Ga., 106 S. E. 551.

48. **Master and Servant**—Accidental Injury.—Where a servant lifting a box weighing 700 pounds or more strained his left side and hernia resulted, there was an "accidental injury" within the meaning of Workmen's Compensation Law, §3, subd. 7.—*Jordan v. Decorative Co.*, N. Y., 130 N. E. 634.

49.—**Double Employment**.—A plaintiff held entitled to recover compensation from a corporation for keeping its books, although he was at the same time employed as bookkeeper for another corporation, on a finding by the jury, supported by the evidence, that the double employment was with the knowledge and consent of both corporations.—*Demonstration Plantation Co. v. Kearney*, U. S. C. C. A., 270 Fed. 772.

50.—**Hearsay Evidence**.—Hearsay evidence alone will not support an award by the Workmen's Compensation Board.—*Valentine v. Weaver*, Ky., 228 S. W. 4036.

51.—**Negligence of Independent Contractor**.—An owner of premises who contracted to have safety doors installed on an elevator shaft as required by law, and who was obliged by his lease to keep the elevator running for his tenants, the work of installation being necessarily dangerous because of the operation of the elevator, is liable for the death of a workman caused by the negligence of the elevatorman, though the latter was employed by an inde-

pendent contractor.—*Besner v. Central Trust Co.*, N. Y., 130 N. E. 577.

52.—**Permanent Impairment.**—The language of the last paragraph of Workmen's Compensation Act 1919, § 16, is not confined to cases of amputation, but includes all cases of injury to the members specified in that section not before provided for, where the usefulness of the member or any physical function thereof is permanently impaired; the word "class" including and referring to the injuries of the members enumerated in the section.—*Clark v. Kennebec Journal Co.*, Me., 113 Atl. 51.

53. **Municipal Corporations** — **Benefit Districts.**—Where benefit districts for apportionment of cost of grading of street extended back 287 feet on one side of the street and 315 feet on the other side of the street, there was not such gross disparity as to require the court to hold that the parcel of land, the benefit district of which was 315 feet wide, was not a "block" with the charter providing that district should extend back to center of "block" if the land is laid off in blocks, and otherwise should extend back 150 feet.—*West v. Burke*, Mo., 228 S. W. 775.

54. **Parent and Child**—**Employment of Minor.**—Where the father, or, in case of his death, the mother, hires a minor son to an employer to do certain work, and the employer, without such parent's consent, puts the minor in a more dangerous employment in which he is injured, the employer is liable to the parent for the subsequent loss of the minor's services.—*Bibb Mfg. Co. v. Howell*, Ga., 106 S. E. 558.

55. **Principal and Surety**—**Delay.**—Under a bond given to secure performance of a building contract, providing that no liability should attach to the surety for default on the part of the contractor unless the obligee should within 30 days after knowledge of such default give written notice to the surety, it was a matter somewhat for the architect to determine whether delays were due to the fault of the contractor, and notice given to the surety upon the first notice or certificate from the architect that the contractor was delaying the work was sufficient, though the limit of time for completing the work was then long past.—*Cowles v. J. C. Mardis Co.*, Iowa, 181 N. W. 872.

56. **Sales**—**Reasonable Time.**—While a protracted course of dealing between the parties may be considered where the question of construction by the parties is involved, a single isolated previous transaction does not fall within the rule making commercial transactions between parties happening in the same way day after day indicative of what constitutes a reasonable time for acceptance of offer and what is so considered and treated by them.—*Dulany-Vernay Co. v. Kalamazoo Stationery Co.*, Mich., 181 N. W. 984.

57.—**Rescission.**—In suit on the original obligation, or for recovery of the consideration, which has reverted to plaintiff buyer by virtue of his tender back of the chattel purchased on account of some defect, it is not necessary either to aver or prove a readiness at all times, or at any subsequent time, to deliver the chattel so tendered, which is equally true whether the effect of the tender is set up in a complaint or plea.—*Maples v. Douglass*, Ala., 87 So. 585.

58. **Statutes**—**Special Privilege.**—Laws 1919, p. 235, § 15½, prohibiting natural persons, firms, or partnerships from transacting the business of transmitting money to foreign countries or of buying and selling foreign money, or of receiving money on deposit to be transmitted to foreign countries, "provided that express, steamship and telegraph companies may continue their business of transmitting money and receiving money to be transmitted," held unconstitutional, in that it grants to such companies a special privilege from which all natural persons are excluded in violation of Const. art. 4, § 22, prohibiting special legislation.—*Wedesweller v. Brundage*, Ill., 130 N. E. 520.

59. **Street Railroads**—**Construction of Ordinance.**—The operation by a traction company of

its street cars over the tracks of another company under the terms of a city ordinance for so long as the two companies were separate corporations and for several years thereafter, with the consent of the city authorities, if not sufficient to establish estoppel to deny that the ordinance authorized such operation, is at least of weight as a construction by the parties that the ordinance authorized such operation.—*Virginia Ry. & Power Co. v. City of Richmond*, Va., 106 S. E. 529.

60. **Theaters and Shows**—**Negligence.**—Passenger of pleasure resort roller coaster, who sat up the arm of the seat instead of in the seat itself, notwithstanding signs directing passengers to sit down and not stand up in the car, and notwithstanding instruction of employees to sit down, held contributorily negligent, precluding recovery of damages for his death after being thrown from car while rounding a curve.—*State v. Glen Echo Park Co.*, Md., 113 Atl. 85.

61. **Trover and Conversion**—**Measure of Recovery.**—In an action for conversion of stock by a seller, brought after his refusal to make delivery on tender of the agreed price, the measure of recovery is the value of the stock at the time of the conversion, and defendant cannot then avoid liability by a tender of the stock, which in the meantime has declined in value.—*Atkins v. Garrett*, U. S. C. C. A., 270 Fed. 939.

62. **United States**—**Soldier Injured on Railroad.**—The War Risk Insurance Act, providing compensation for injuries to a soldier, was exclusive of all other remedies, so that no right to action against the Director General, who represented the United States, could be maintained by such soldier for injuries sustained on a government controlled railroad under Acts of Congress June 29, 1906, August 29, 1916, March 21, 1918, or February 28, 1920; such a suit would, on account of his status as a soldier, be a suit against the government.—*Moon v. Hines*, Ala., 87 So. 603.

63. **Vendor and Purchaser**—**Option.**—An option to purchase property if given for a valuable consideration is a valid contract, but if given without a consideration is a mere offer which may be withdrawn at any time before acceptance.—*Morrison v. Johnson*, Minn., 181 N. W. 945.

64. **Warehousemen**—**Liability.**—In an action against a warehouseman which plaintiff claimed had wrongfully delivered his goods to another, the fact that, when the goods were shipped by third person to the warehousemen, liability was released to obtain a low freight rate, is no ground for limiting warehousemen's liability.—*Selb v. Pacific Storage & Transfer Co.*, Wash., 196 Pac. 584.

65. **Wills**—**"Bodily Heirs."**—In a deed conveying the estate to grantor's son for life and after his death in fee simple to his bodily heirs if any, and if none to his next of kin, the words "bodily heirs" mean children, so that the son took only a life estate which he could not devise and in which his widow was entitled to no dower, since it was not an estate of inheritance.—*Wallace v. Wallace*, N. C., 130 S. E. 501.

66.—**Condition Subsequent.**—Where testatrix devised land in trust to pay the larger portion of the proceeds to defendant provided she should furnish a home for the testatrix's feeble-minded son, with directions that upon the death of the son the land should be conveyed to defendant, the condition should be deemed one subsequent.—*Jackson v. Knapp*, Ill., 130 N. E. 524.

67.—**Residuary Legatee.**—Daughter named as residuary "legatee" held entitled to realty as well as personality; "legacy."—*Allen v. Cameron*, N. C., 106 S. E. 484.

68.—**Trust.**—Where testatrix gave all the residue and remainder of her estate to be disposed of as the beneficiary might think would be in accordance with her wishes, the beneficiary must be deemed to hold such property in trust for the heirs at law of testatrix.—*Buzzell v. Fogg*, Me., 113 Atl. 50.

# INDEX-DIGEST

TO THE EDITORIALS, NOTES OF RECENT DECISIONS, LEADING ARTICLES, ANNOTATED CASES, LEGAL NEWS, CORRESPONDENCE AND BOOK REVIEWS IN VOL. 92.

A separate subject-index for the "Digest of Current Opinions" will be found on page 466, following this Index-Digest.

## ACCIDENT INSURANCE.

- necessary inference of danger in exposure to injury, 91.
- meaning of "collision" in automobile insurance, 417.

## ANTI-NARCOTIC ACT.

- compromising offenses under the internal revenue laws, 45.

## ALIENS.

- the rights of women as citizens, 120.

## ARMY AND NAVY.

- has a soldier injured while being transported over a railway operated under federal control a right of action against the Director General, 389.

## ASSOCIATIONS.

- for business associations under declarations of trust, see TRUSTS.

## ATTORNEY AND CLIENT.

- a bill to regulate the practice of law in Florida, 307.
- what constitutes the practice of the law, 54.

## AUTOMOBILES.

- can an automobile commit an offense, 209
- contributory negligence of guest in automobile, 80.
- meaning of "collision" in automobile insurance, 417.
- name on vehicle as evidence, 341.

## BANKRUPTCY.

- a trustee in bankruptcy who turned a bankrupt business into a solvent going concern, 405.
- persons engaged chiefly in farming, 361.

## BANKS AND BANKING.

- the controversy between the federal reserve banks and the state banks in certain reserve districts over collection charges, 243.
- failure of bank to apply maker's deposit to overdue paper, 301.
- interesting British decisions in banking practice, 339.
- federal reserve banks prohibited from forcing state banks to cash checks at par, 444.

## BAR ASSOCIATIONS.

- bar association meetings for 1921—when and where to be held, 201, 292, 363.

the conference of bar association delegates—what it is and what it is doing, 79.

notice of meeting of the American Bar Association, 111.

program of the meeting of the Alabama Bar Association, 307.

notice of the meeting of the Arkansas Bar Association, 344.

program of the meeting of the Georgia Bar Association, 363.

program of the meeting of the Idaho Bar Association, 37.

program of the meeting of the Illinois Bar Association, 381.

program of the meeting of the Louisiana Bar Association, 381.

program of the meeting of the Michigan Bar Association, 380.

report of the meeting of the Florida Bar Association, 307.

report of the meeting of the Idaho Bar Association, 165.

## BENEFIT SOCIETIES.

- suit for money collected by assessment by benefit society not a suit in rem, 317.

## BIGAMY.

- void and voidable marriages in prosecutions and bigamy, 108.

## BILLS AND NOTES.

- is accommodation indorser's liability affected by extension of note, 190.

illegality under the Negotiable Instruments Law, 27.

## BOOK REVIEWS.

reviews of Digests,

American Digest, Volume 9A, 364.

Missouri Digest—Volumes 16 and 17, 184.

reviews of encyclopedias,

Corpus Juris, Volume 14A, 438.

Corpus Juris, Volume 21, 346.

Corpus Juris, Volume 23, 456.

reviews miscellaneous,

Wilson's Civil Practice Manual of New York, 345.

reviews of statutes,

Barnes' Federal Code, 1921 supplement, 94.

reviews of text books,

Ballantine's Preparation of Contracts and Conveyances, 382.

Collier on Bankruptcy, Twelfth Edition, 381.

Foulke's International Law, 112.

Holmes' Federal Income Tax, 1921 supplement, 94.

Kales' Estates and Future Interests, 420.  
Montgomery's Federal Income Tax Procedure, 202.

Montgomery's Excess Profits Tax Procedure, 202.

Schouler on Marriage, Divorce, Separation and Domestic Relations, Sixth Edition, 345.

#### BOOKS RECEIVED.

112, 130, 148, 166, 310, 364.

#### BOYCOTTS.

see LABOR UNIONS.

#### CARRIERS OF GOODS.

duty of carrier to return prepaid freight if not delivered, 146.

#### CARRIERS OF PASSENGERS.

carrier liable only for want of ordinary care when dangers are trifling and not wholly under its control, 246.

when relation of carrier and passenger begins in case of street car company, 272.

injuries to street car passengers due to jerks and jolts of cars, 304.

has a soldier injured while being transported over a railway operated under federal control a right of action against the Director General, 389.

is a carrier liable for arrest of passenger on a railroad train, 406.

#### CITIZENS.

the rights of women as citizens, 120.

#### CODIFICATION.

see STATUTES.

#### COMMERCE.

see INTERSTATE COMMERCE.

carrying mail as interstate commerce, 35.

car and engine repairmen as employees in interstate commerce, 323.

#### CONSTITUTIONAL LAW.

see COMMERCE.

exemption of farmers from operation of Food Control Act denial of due process of law, 3.

shall the Supreme Court or politicians interpret the Constitution, 61.

the quadrennial interregnum, 117.

shall the Supreme Court or local politicians interpret the Constitution, 129.

stretching the Constitution—the Ball rent law decision, 315.

recall of judicial decision held to be unconstitutional, 425.

power of congress over primaries for the selection of United States senators, 445.

#### CONTRACTS.

contracting out, 447.

#### COURTS

see FEDERAL COURTS.

acts of aggression which the courts will permit without imposing liability for subsequent injuries, 6.

a court of domestic relations and a unified court system, 42.

the municipal court of Chicago—its adoption and organization, 81.

the psychopathic laboratory of the municipal court of Chicago, 102.

why a special patent court, 333.

#### CRIMINAL LAW.

the psychopathic laboratory of the municipal court of Chicago, 102.

if compulsion were declared a crime, 111.

"to exact excessive prices for necessities" not sufficient to define a crime, 207.

indirect reference to failure of defendant in criminal case to testify, 246.

when possession of a thing is criminal, 353.

the "endeavor" to commit a crime is not an "attempt" to commit a crime, 389.

psycho-pathology and its influence on the administration of criminal law, 443.

#### ELECTIONS.

power of congress over primaries for the selection of United States senators, 445.

#### EQUITY.

is the reformed procedure destroying equity, 248.

#### ESPIONAGE ACT.

an English criticism of the Abrams decision construing the Espionage Act, 369.

#### EVIDENCE.

is a communication furnished to a surety company by an employer of a former employee privileged, 119.

the duty of the court to instruct the jury as to weight to be given dying declarations, 226.

#### EXTRADITION.

the law and procedure of extradition, 297.

#### FEDERAL COURTS.

"affidavits of prejudice" in federal courts are conclusive, 261.

the danger of the increased burden upon the federal Supreme Court from its continually expanding docket, 279.

suits arising under the laws and Constitution of the United States, 370.

danger of the increased burden on the federal Supreme Court from its continually expanding docket, 381.

judicial prejudice and bias, 387.

#### FOOD CONTROL.

"to exact excessive prices for necessities" not sufficient to define a crime, 207.

#### FRAUDS, STATUTE OF

agreement to execute a new lease within statute, 298.

#### HOMICIDE.

is proof that defendant's wife was a prostitute before marriage admissible against defendant's plea of sudden passion on learning of wife's intimacy with deceased, 63.

the duty of the court to instruct the jury as to weight to be given dying declarations, 226.

#### HUMOR OF THE LAW.

20, 38, 56, 74, 94, 112, 130, 148, 166, 184, 202, 220, 238, 256, 274, 292, 310, 328, 346, 364, 382, 400, 420, 438, 456.

#### ILLEGALITY.

see SUNDAY.

agreement by public officer to render services for sum less than fixed by law as a valid agreement when executed, 192.



## INCOME TAX,

- recent income tax decisions, 64.
- is a gain in value realized from the sale of property income, 99.
- is there a limit upon salaries paid by corporations which may be deducted in computing income tax, 100.
- procedure in income tax cases, 319.
- the future of the federal income tax, 354.
- profits on sale of stock or bonds as income, 398.

## INFANTS,

- the custody of an infant—general survey of the interests involved, 228.
- the custody of an infant—interests secured by the decided cases, 250.
- the domicile of an infant—while the infant's father is alive, 264.
- the domicile of an infant—after the infant's father dies, 282.

## INJUNCTIONS,

- enjoining enforcement of judgment because of fraud of plaintiff in simulating injury, 1.

## INSANE PERSONS,

- the psychopathic laboratory of the municipal court of Chicago, 102.
- psycho-pathology and its influence on the administration of the criminal law, 443.

## INSURANCE,

- see ACCIDENT INSURANCE.
- see LIFE INSURANCE.
- see BENEFIT SOCIETIES.

## INTERNAL REVENUE,

- effect of efforts to compromise offenses under the internal revenue laws, 45.

## INTERNATIONAL LAW,

- the power of congress to establish peace, 137.
- right of foreign ambassador to file a "suggestion" of ownership of a ship attached by process, 371.

## INTERSTATE COMMERCE,

- see COMMERCE.
- incidental work as part of interstate commerce, 378.

## INTOXICATING LIQUORS,

- see INTERNAL REVENUE.
- does the Volstead enforcement act repeal state restrictive prohibition laws, 46.
- can forfeited liquors be used in evidence after seizure without process, 136.
- conviction under state dry law as bar to prosecution under federal act, 200.
- proprietary medicine as intoxicating liquor, 236.
- does the Volstead Act avoid a lease of a cafe, 335.

## JUDGMENTS,

- enjoining enforcement of judgment because of fraud of plaintiff in simulating injury, 1.
- validity of warrant of attorney to confess judgment, 148.
- vacating judgment on ground of perjured testimony, 181.

## LABOR UNIONS,

- secondary boycotts illegal, 262.
- industrial coercion, 299.

## LANDLORD AND TENANT,

- validity of leases of machinery which in effect prohibit the purchase of competing machines, 5.
- power of state to regulate rents, 217.
- agreement to execute a new lease within statute of frauds, 298.
- contracting out, 447.

## LAW AND LAWYERS,

- the conference of bar association delegates what it is and what it is doing, 79.
- how the study of the law becomes a passion of the soul, 135.
- the return of the lawyers' leadership, 171.
- the title, Mr. Justice, 183.
- John Marshall, 336.
- lawyers of ancient Rome, 407.
- is there a resurrection at the bar, 448.

## LEVER ACT,

- see FOOD CONTROL.

## LIFE INSURANCE,

- life insurance payable to wife belongs to husband's trustee in bankruptcy, 281.

## MARRIAGE AND DIVORCE,

- see BIGAMY.
- validity of marriage where laws of state forbid divorced persons from remarrying, 123.
- marriage under age of consent not void but voidable, 127.

## MASTER AND SERVANT,

- penalizing employer of minor in Workmen's Compensation Act, 73.
- injuries due to sportive act of fellow employees, 162.
- injuries arising out of and in the course of employment, 156.
- injuries received going to and from work, 176.
- injuries received during cessation of work, 195.
- effect of refusal of employee to undergo operation on right to compensation, 255.
- name on vehicle as evidence, 341.

## MINES AND MINERALS,

- does a reservation in a deed of all "minerals" include oil and gas, 26.

## MONOPOLIES,

- validity of leases of machinery which in effect prohibit the purchase of competing machines, 5.

## NATURALIZATION,

- the rights of women as citizens, 120.

## NEGLIGENCE,

- see NUISANCES.
- see SAFETY APPLIANCE ACT.
- application of res ipsa loquitur in cases of injuries due to exploding bottles, 290.
- a passive situation as a proximate cause, 390.
- liability of water company for loss by fire due to inadequate supply or facilities, 452.

# **NEGOTIABLE INSTRUMENTS,**

see **BILLS AND NOTES.**

# **NUISANCES,**

the doctrine of nuisances attractive to children as applied to artificial bodies of water, 101.

# **OFFICERS,**

agreement by public officer to render services for sum less than fixed by law as a valid agreement when executed, 192.

# **OIL AND GAS,**

does a reservation in a deed of all "minerals" include oil and gas, 26.

# **PATENTS,**

right to bill of review when one federal court affirms and another denies a patent right, 175.  
why a special patent court, 333.

# **PEACE,**

the power of congress to establish peace, 137.

# **POLICE POWER,**

see **RATE REGULATION.**

see **RENT REGULATION.**

prevention of the use of natural gas for carbon is within the police power of the state, 155.

power of Indiana Coal Commission to fix the price of coal, 173.

price regulation under the federal Constitution, 372.

# **PRICE REGULATION,**

see **POLICE POWER.**

price regulation under the federal Constitution, 372.

# **PROCEDURE,**

see **VERDICTS.**

proposed amendment giving the Supreme Court of Texas power to make rules of procedure, 111.

the campaign to modernize federal procedure at law, 351.

# **PROFESSIONAL ETHICS,**

Recent Decisions by the New York County Lawyers Association Committee on Professional Ethics, 19, 201, 327, 344.

# **PROXIMATE CAUSE,**

see **NEGLIGENCE.**

# **PUBLIC UTILITIES,**

see **RATE REGULATION.**

# **PURE FOOD AND DRUG ACT,**

misbranding proprietary medicines, 44.

liability of restaurant keeper for serving deleterious food, 48.

# **RAILROADS,**

incidental work as part of interstate commerce, 378.

# **RATE REGULATION,**

enjoining rates based on valuation of public utilities at original cost, 153.

power of state to change rates of public service company fixed by agreement, 435.

# **RECALL OF JUDICIAL DECISIONS,**

see **CONSTITUTIONAL LAW.**

# **RECENT DECISIONS IN THE BRITISH COURTS,**

175, 247, 339.

# **RENT REGULATION,**

power of state to regulate rents, 217.

stretching the Constitution—the Ball rent law decision, 315.

# **RES IPSA LOQUITUR,**

see **NEGLIGENCE.**

# **SAFETY APPLIANCE ACT,**

violation of Safety Appliance Act must be the proximate cause of injury to justify action under that act, 428.

# **SALES,**

implied warranty by dealer, 17.

is there an implied warranty in a sale to agent, 189.

# **SEARCHES AND SEIZURES,**

limitations on the power of the United States government to seize evidence under a search warrant, 225.

# **SHIPS AND SHIPPING,**

duty of carrier to return prepaid freight if not delivered, 146.

right of foreign ambassador to file a "suggestion" of ownership of a ship attached by process, 371.

conditions in English shipping documents, 430.

# **STARE DECISIS,**

on the smashing of a precedent, 25.

# **STATUTES,**

the aftermath of codification, 65.

# **SUNDAY,**

does an agreement to appear in Sunday performance where such performances are illegal render the contract void, 209.

# **SURETIES AND SURETYSHIP,**

extent of liability on surety bonds given by contractors for United States government work, 227.

# **TAXATION,**

see **INCOME TAX.**

see **INTERNAL REVENUE.**

the state's prerogative right of priority in payment of taxes over unsecured creditors, 156.

# **TORTS,**

liability of restaurant keeper for serving deleterious food, 48.

# **TRIAL,**

see **VERDICTS.**

## TRUSTS,

companies formed under declaration of trust are associations under Income Tax Act, 4.

## USURY,

reserving interest in advance as working usury, 52.

## VERDICTS,

application of the scintilla rule by the courts, 431.

## VOLSTEAD ACT,

see INTOXICATING LIQUORS.

## WATERS AND WATER COURSES,

liability of one who substitutes an artificial for a natural channel of a stream for resulting damage, 191.

the modern test of navigability, 427.

## WEEKLY DIGEST OF IMPORTANT OPINIONS,

21, 39, 57, 75, 95, 113, 131, 149, 167, 185, 203, 221, 239, 257, 275, 293, 311, 329, 347, 365, 383, 401, 421, 439, 457.

## WORKMEN'S COMPENSATION ACT,

see MASTER AND SERVANT.

car and engine repairmen as employees in interstate commerce, 323.

right of officers of corporation to compensation under workmen's compensation law, 336.

# SUBJECT-INDEX

TO ALL THE "DIGESTS OF CURRENT OPINIONS" IN VOL. 91.

This subject-index contains a reference under its appropriate head to every digest of current opinions which has appeared in the volume. The references, of course, are to the pages upon which the digest may be found. There are no cross-references, but each digest is indexed herein under that head for which it would most naturally occur to a searcher to look. It will be understood that the page to which reference, by number, is made, may contain more than one case on the subject under examination, and therefore the entire page in each instance will necessarily have to be scanned in order to make effective and thorough search.

- Account Stated—Absolute Acknowledgment, 293; Bill of Items, 113.
- Actions—Equity, 39; Tort and Contract, 113.
- Admiralty—Maritime Contract, 95; Workmen's Compensation Act, 257.
- Adoption—Judicial Procedure, 57.
- Adverse Possession—Intent, 149; Mistake of Fact, 311; Recorded Deeds, 167; Tenancy by Sufferance, 39.
- Aliens—Inheritance of Land, 203; Ownership of Land, 21.
- Alteration of Instruments—Fraud, 75.
- Animals—Dipping Cattle, 383; Escaping Animals, 185; Vicious Dog, 149.
- Apprentices—Statutory Rule, 21.
- Army and Navy—Moratorium Statute, 329; Refund of Payments, 167; Release from Contract, 185; State Legislation, 131.
- Arrest—Without Warrant, 131.
- Assault and Battery—Aggravation, 39; Civil Liability, 113; Damages, 131; Punitive Damages, 365; Search of Prisoner, 401.
- Assignments—Equity, 95, 113.
- Attachment—Action for Tort, 457; Discharge of Liability, 185; Dismissal, 293.
- Attorney and Client—Cessation of Litigation, 75; Conveyance to Attorney, 457; Debtor and Creditor, 439; Disbarment, 329, 365, 457; Discharge of Attorney, 167; Disqualification, 185; Fraudulent Opinion, 457; Freedom of Speech, 131; Futile Defense, 113; High Cost of Living, 275; Impropriety, 365; Knowledge of Attorney, 293; Lien, 293, 347, 401; Quantum Meruit, 221; Ratification, 329; Reasonable Fee, 257; Release of Attachment, 221.
- Automobiles—Dangerous Vehicle, 149; Negligence of Family, 149.
- Bailment—Conversion, 149, 439; Destruction of Cotton, 421; Improper Valuation, 439; Liability of Dry Cleaners, 311; Liability for Storage, 257; Novation, 329; Return of Property, 149; Storage Charges, 239.
- Bankruptcy—Advice of Counsel, 311; Allowance to Attorneys, 39; Ancillary Receivers, 239; Appearance, 383; Appearance of Credit, 241; Breach of Contract, 365; Chattel Mortgage, 329; Claims, 57; Composition, 75, 311; Concealed Assets, 221; Conditional Sale, 457; Construing Contract, 275; Crops on Homestead, 185; Custom of Trade, 95; Discharge, 75; Equitable Lien, 257, 383; Estoppel by Laches, 329; Evidence of Value, 439; Examination Before Adjudication, 365; Expectancy as Property, 167; Fair Valuation, 203; False Oath, 329; False Pretenses, 439; Homestead Exempt, 185, 383; Informality, 439; Insolvency Matter of Law, 185; Insurance, 131; Legal Capacity of Partners, 365; Misrepresentation, 75; Moral Obligation, 75; Mortgage to Minor Children, 347; No Judgment Recoverable After Adjudication, 293; Petition for Dissolution, 347; Preference, 75, 203, 275, 401, 421; Priority, 421; Privilege of Bankrupt, 21; Reclamation, 401; Reopening Estate 347; Replevin, 167; Reviewable Order, 131; Setting Aside Adjudication, 167; Settlement Under Lease, 457; Statute of Waste, 457; Subcontractor's Title, 203; Surety, 75; Surviving Partner, 401; Transfer of Property, 239; Unclaimed Dividends, 347; Unloading Street Rubbish, 401; Usury, 185; Waiver of Tort, 257.
- Banks and Banking—Acceptance, 239; Application of Deposits, 239; Act of Official, 401; Cable Transmission, 457; Conversion, 21; Delivery of Check, 311; Deposits in Failing Bank, 401; Dishonor of Check, 203, 457; "Doing Business in State," 275; Forgery, 57; Imputable Knowledge, 39; Liability of Stockholder, 57; Negligence, 95; Power of Congress, 311; Preferential Payment, 221; Purchase by Telegram, 257; Receivership, 39; Recovery on Forged Check, 329; Special Deposit, 293; Stockholders' Liability, 21, 365; Ultra Vires, 347, 457; Unsatisfied Judgment, 221.
- Bastards—Cruel and Unusual Punishment, 39; Presumption of Legitimacy, 57.
- Beneficial Associations—Exhaustion of Remedy, 131; Remedy, 275; Void Constitution, 421.
- Bigamy—Burden of Proof, 39.
- Bills and Notes—Acceptance by Telegram, 39; Accommodation Note, 329; "As Per Contract," 401; Bad Faith, 39; Bona Fide Purchaser, 57; Burden of Proof, 21, 149; Caveat Emptor, 57; Compromise, 57; Conditional Delivery, 113; Consideration, 39; Delay in Banking, 203; Delay in Presentation, 57; Delivery to Wrong Person, 347; Demand, 457; Demand on Administrator, 185; Duress, 293; Erroneous Judgment, 293; Extended Indebtedness, 329; Failure of Consideration, 257; Fictitious Payee, 439; Filling Blanks, 39; Holder for Value, 293, 329; Holder in



Due Course, 221; Indorser, 167, 293; Indorser's Contract, 149; Joint and Several Obligors, 239; "Negotiable," 347; Negotiation, 75; Non-negotiable, 221; Note as Collateral, 185; Place of Delivery, 329; Renewal by Married Woman, 421; Right to Sue, 311. Stated Condition, 347; Threat, 149; Transfer, 57; Unconditional Promise, 95; Validity, 275; Waiver of Defense, 167; "Witness" Not Liable, 329.

Blasphemy—What Constitutes, 457.

Boundaries—Courses and Distances, 95, 131; Monuments and Distances, 21.

Brokers—Agency, 113; Agreed Commission, 131; As Principal and Agent, 383; Bankruptcy of Company, 275; Binding Contract, 75. Commission, 275, 293, 347, 365; Compensation, 439; Consideration, 365; Defective Title, 113; Dual Employment, 75, 95, 458; Efficient Cause, 95; Estoppel, 57; Listing Property for Sale, 383; May Purchase From Owner, 167; Parol Contract, 185; Representing Both Parties, 239; Revocation of Agency, 21, 75. Right to Commission, 239, 257, 311; Sale to Customer's Agent, 267; Subsequent Agreement to Sell, 239; Usual Commission, 221; Variance in Terms, 167; Volunteer, 257.

Burglary—Unexplained Possession, 131.

Carriers of Goods—Assignment of Bill of Lading, 311; Bill of Lading, 95, 275; Charge for Switching, 365; Confiscatory Rate, 365. Conversion, 439; Delivery, 239; Deviation From Route, 329; Extra Freight Charge, 275; Inspection, 439; Insurance, 239; Liability of Express Company, 401; Liability of Purchaser of Draft, 329; Limitation of Liability, 330; Misdelivery, 365; Negligence, 330; Perishable Goods, 312; Recovery of Rate on Whiskey Shipment, 275; Second Carrier, 39; State Power to Fix Rates, 401. Stated Valuation, 347; Suit for Overcharge, 167; Trover and Conversion, 293.

Carriers of Live Stock—Delay, 75; Liability, 167; Reasonable Care, 275; Reasonable Diligence, 57.

Carriers of Passengers—Alighting, 57, 95, 221, 275; Assault, 95, 131, 347, 458; Caretaker of Cattle, 203; Continuous Ride, 276; Contributory Negligence, 239; Correct Time, 458; Degree of Care, 421, 458; Duty to Passengers, 276; Elevators, 330; Entering Sleeping Car, 421. Fine Print on Check, 21; Free Service, 113; Highest Degree of Care, 347; Humanitarian Doctrine, 258; Insults and Assaults, 131; Intending Passenger, 95; Intoxication, 113; Loss of Baggage, 330; Negligence, 203, 276, 293, 366, 458; Overcrowded Cars, 40; Proximate Cause, 75; Res Ipsa Loquitur, 113; Speeding Street Cars, 221; Treatment as Negro, 186; Waiver of Limitation of Liability, 258.

ChamPERTY and Maintenance—Attorney as Judgment Creditor, 402; Bona Fide Possession, 132. Hostile Possession, 76.

Charities—Request to Fire Suppression Corporation, 458; Benevolence, 439; Cy Pres, 40; Equity, 113; Mismomer in Bequest, 167; Valid Trust, 312.

Chattel Mortgages—Automobile, 149; Conditional Sale, 439; Crops, 347; Defective Record, 40; Recording, 95; Right of Action, 440; Tender, 132; Use of Property, 132; Waiver, 239.

Civil Rights—Validity of Statute, 186.

Commerce—Arbitration and Award, 276; Assumed Business Name, 421; Common Carrier, 293; Discrimination, 21; Employers' Liability Act, 167, 294; Interstate Commerce, 186, 240, 258, 276, 421, 440; Intrastate Shipment, 203; Natural Gas, 57; Privilege Tax, 258; Safety Appliance Act, 113, 330.

Compromise and Settlement—Marriage Promise, 76.

Conspiracy—Fraudulent Scheme, 203; Where One Acts, 149.

Constitutional Law—Arraignment, 57; Building Unlawfully Erected, 348; Class Legislation, 294; Contract, 95; Court Martial, 258; Custody of Child, 21. Dance Ordinance, 383; Delegation of Legislative Power, 383; Discrimination, 132; Dower, 114; Due Process, 186, 276, 312, 383, 402, 421; Eminent Domain, 240; Employers' Liability Act, 203; Enemy Property, 347; Equal Protection, 276; Excise Tax, 366; Foreign Corporation, 40; Foreign Insurance Company, 347; Housing Laws, 294; Increase in Hydrant Rates, 240; Internal Revenue, 240; Legislative Authority, 312; Legislative Judgment not Reviewable, 366. Obligation of Contract, 96; Police Regulation, 240; Power of General Assembly, 221; "Property," 402; Public Policy, 132; Public Utility, 149; Right to Appeal, 294; Statute Requiring Use of English Language, 348; Unreasonable Rent, 276; Vested Right of Employers, 240.

Contracts—Architect, 40; Breach of Warranty, 76; Buyer's Right to Fix Standard, 168; Change in Contract, 312; Compounding Felony, 58; Confidential Relation, 132; Construction, 132; Definiteness, 40. Duress Invalidates, 149; Essence of, 21, 40; Fiduciary Relation, 383; Fraudulent Promise, 258; Inadequacy of Consideration, 76; "Information," 348; Intent, 58; Interpretation, 149; Interstate Commerce, 440; Mutuality, 40, 132, 168, 186, 348, 440; Oral, 402; Practical Construction, 114; Public Policy, 95, 114, 421, 440; Reading by Party, 40; Recitals, 132; Rescission, 40; Specifications, 330; Substantial Performance, 222; Time of Essence, 96; Time for Performance, 186; Unconscionable Bargain, 114; Unilateral, 76; Violation of Specifications, 440.

Copyrights—Monopoly, 149.

Corporations—Abuse of Power, 440; Authority of Agent, 168; Authority of Branch Office, 258; Breach of Contract, 312, 366; Cancellation of Stock, 312; Change of Name, 40; Creditors, 348. Delinquent Stockholder, 132; Directors, 40, 114; "Doing Business in State," 240, 276, 294; Duration of Contract, 422; Estoppel to Deny Contract, 168; Execution of Note, 149; Express Warranty, 76; False Representations, 258, 422; Foreign Corporation, 294, 330; Fraudulent Conveyance, 168; Holding Out Agent, 76; Illegal Issue of Stock, 276; Insolvency, 114; Interlocking Directorates, 366; Issuance of Stock for Past Services, 240; Knowledge of Agent, 366; Liability of Officers, 330. Liability of Stockholder, 258; Liability on Note for Stock, 168; Liability for Unpaid Stock, 240; "Local Agent" Defined, 168; Note, 312; Overvaluation of Property, 334; Payment for Stock in Property, 258; Power of President, 168; Profit, 96; Ratification, 40, 131, 312; Receivership, 96; Repurchase of Stock, 186, 348; Rescission of Contract to Purchase Stock, 168; Rescission of Sale of Stock, 440; Right of Action, 276. Right of Action of Stockholder, 294; Right of Foreign Corporation to Sue, 366; Right to Sell Securities, 294; Sale of Stock to Officers, 422; Secret Profits, 76; Slander, 76; Subscriptions to Stock, 76; Surplus, 132; Trust Fund, 22; Ultra Vires, 149; Unliquidated Claims, 402; Voting Proxy, 402; Waiver, 22.

- Courts**—Comity, 40; Extra-Territorial Force, 22; Foreign Laws, 58; Implied Contract, 96; Jurisdiction, 22, 96; Review of Decision, 40; Transitory Action, 40.
- Covenants**—Against Incumbrances, 168; Building Restrictions, 240; Recovery on Warrant, 458; "Residence Purposes," 186; Restrictions, 76, 168.
- Creditors' Suit**—Equitable Assets, 96; Misjoinder, 132.
- Criminal Law**—Accomplice, 76, 96; Admissions, 40; Comparison of Writing, 96; Confession, 96; Confrontation, 96; Failure to Testify, 58; Forfeiture, 22; Fugitive From Justice, 40; Good Character, 58; Good Faith, 76; Instructions, 41; Intent, 41; Intoxicating Liquors, 132; Res Gestae, 41, 58, 132; Sentence, 114; Similar Offenses, 114; Subornation of Perjury, 76; Subsequent Offense, 41; Suspension of Judgment, 149; Suspended Sentence, 76; Syndicalism Law, 186; Vagrancy, 132; Warrant Commitment, 58.
- Curtsey**—Seisin, 22.
- Customs Duties**—Collector Cannot be Sued as Official, 384; Opium not Merchandise, 458.
- Damages**—Earning Power, 150; Excessive, 402; Joint Liability, 294; Liquidated, 22; Mental Anguish, 222; Water From Reservoirs, 366.
- Death**—Damages, 41, 76; Divorce, 22; Intoxication, 22.
- Dedication**—Acceptance, 58; Plat, 22; Public Use, 276.
- Deeds**—Condition Subsequent, 168; Conveyance to Imbecile, 402; Defeasible Fee, 203; Delivery, 58, 76, 132; Equitable Title, 258; Failure of Consideration, 114; Inadequacy of Price, 168; Merger, 114; Opinion Evidence, 132; Parent to Child, 440; Quitclaim, 132; Remainders, 384; Reservation, 150; Rule in Shelley's Case, 132; Subsequent Conveyance, 114; Undue Influence, 186, 422.
- Depositories**—Liability on New Bond, 384.
- Descent and Distribution**—Executor de son Tort, 41; Good Will, 22; Merger, 114; Privilege, 150; Receipt for "Partial Share," 384.
- Divorce**—Action Pending in Another State, 186; Alimony, 41, 402; Alimony Pendente Lite, 294; Amendment of Petition, 168; Annulment of Decree, 76; Attorney Representing Both Parties, 150; Bed and Board, 133; Clean Hands, 458; Collateral Purpose, 114; Contempt, 168; Cross Bill, 186; Cruel Treatment, 458; Custody of Child, 22, 276; Industrial Insurance, 222; Jurisdiction, 58; Maintenance, 58; Property Interests, 150; Public Policy, 133; Remarriage, 150; Separation for Abandonment, 222; Validity of Statute, 186.
- Domicile**—Mental Capacity Requisite to Change, 440.
- Dower**—"Ancestral Estate," 440; Disposal by Wife, 96; Insurance, 440; Marriage Relation, 22.
- Drains**—Drainage District not Corporation, 348; Revetment, 348.
- Easements**—Non-User, 96; Prescription, 96; Special Right, 114; Streets, 150; Unlawful Use, 114; Verbal Agreement, 58.
- Ejectment**—Equitable Title, 114; Nature of, 77.
- Elections**—Defectively Marked Ballots, 168; "Distinguishing Mark," 402.
- Electricity**—City Ordinance, 312; Degree of Care, 366; Due Care, 258, 458; Duty to Public, 222; Intermeddler, 312; Negligence, 114, 186, 276, 422; Ordinary Care, 384; Proximate Cause of Injury, 348.
- Eminent Domain**—Abandonment of Land, 366; Assessment of Damages, 440; Change of Grade, 458; Damages, 22, 114; Due Compensation, 168; Flood, 294; Licenses, 258; New Ditch, 402; Public Crossing, 312; Public Use, 41, 276, 458; Reciprocal Law, 58; Right of Way, 186; Speculative Damages, 133; Warehouse, 150.
- Equity**—Amending Pleadings, 133; Clean Hands, 22; Concurrent Jurisdiction, 22; Laches, 58. Obstacle to Enforcement, 77.  
Escrow—Mutuality, 114.
- Estates**—Rule in Shelley's Case, 150.
- Estoppel**—Additional Service, 458; Agreement With Railroad, 276; Change of Ground, 133; Deficiency Judgment, 422; Definition, 77; Executors and Administrators, 277; Judicial Sale, 458; Mutuality, 58; Repudiation, 22; Rule of Law, 58; Waiver, 58.
- Evidence**—Admissibility, 133; Admissions Competent, 186; Adverse Possession, 22; Burden of Proof, 96; Declarations of Agent, 41; Estoppel, 77; Expert Defined, 41; Instructions, 58; Judicial Notice, 258, 294; Latent Ambiguity, 41; Lost Telegram, 168; Pedigree, 96; Physical Facts, 114; Presumption, 22; Receipt, 114; Res Gestae, 96, 458; Witness, 114.
- Execution**—Levy, 58; Supplementary Proceedings, 150; Vendor's Lien, 22.
- Executors and Administrators**—Attorney, 22; Claim of Partnership, 384; Dispensing with Administration, 41; Equity, 22; Failure to Qualify, 204; Heir's Indebtedness to Estate, 294; Indebtedness by Executor, 41; Individual Preferment, 150; Insurance Agent not Trustee, 330; Judgment Liens, 348; Payment of Note, 222; Personal Representative, 186; Testamentary Direction, 133; Waste, 240.
- Exemptions**—Waiver, 187.
- Explosives**—Escaping Gasoline, 240; Municipal Regulations, 240; Negligence per se, 22; Sale to Child, 222.
- False Imprisonment**—"Escape," 384.
- False Pretenses**—Check with no Funds, 240; Community Property, 204; Knowledge of Fraud, 458; What Constitutes, 150.
- Fixtures**—Chattel as Personality, 258; Electric Elevator, 422; Electric Wiring, 440; Erection on Government Property, 348; Ownership of Chattel, 348; Pavement, 422; Removal, 150; Severance, 23.
- Food**—Adulteration, 348; Police Power, 277, 366.
- Forgery**—Essential Element, 23; Variance, 114.
- Fraud**—Damages, 150; False Representations, 294; Secret Knowledge, 312; Statement of Intent, 187.

Frauds, Statute of—Agreement not Within Statute, 204; Authority of Agent, 294; Binding Contract, 294; Debt of Another, 41; Memorandum of Sale, 23; Memorandum on Check, 77; Oral Contract, 168, 222; Oral Sale, 23; Original Promise, 402; Part Performance, 258, 277; Performance, 150; Performance Within Year, 23; Repurchase of Corporate Stock, 294; Restrictions in Equity, 97; Right of Action, 440; Secondary Agreement, 222.

Fraudulent Conveyances—Bona Fide Purchaser, 133; Bulk Sales Statute, 440; Claimant in Execution, 402; Condition to Attack, 204; Equity, 58; Inadequate Consideration, 77; Intent, 150; Preference, 150; Re-Transfer, 41; Sale to Wife, 187; Stipulation in Deed, 204; Stock as Bonus, 240; Subsequent Creditors, 133; Trustee, 168.

Game—Ownership of Land, 222.

Gaming—Averments, 384.

Garnishment—Bank Deposit, 402.

Gas—Calculation of Cost, 294; Condition of Establishment, 402; Not Public Utility, 348; Rate Contracts, 312.

Gifts—Bank Deposit, 348; Confidential Relations, 133; Delivery, 41, 77; Intent, 150; Inter Vivos, 312; Parol Gift, 150; Revocation, 422.

Guaranty—Accommodation Indorser, 348; Continuing Guaranty, 330; Direct Action, 330; Forbearance, 440.

Guardian and Ward—Dependent Children, 150.

Habeas Corpus—Custody of Child, 330; Jurisdiction, 97; Valid Judgment Appealable, 440.

Highways—Dedicated but not Adopted, 169; Driven Cattle, 402; Equal Rights, 23; Good Roads Act, 348; Improving District, 169; Kind of Highway Desired, 277; Knowledge of Defects, 150; Law of Road, 59; Liability of Surety, 441; Prescriptive Use, 384; Proper Supplies, 441; Public Square, 59; Reasonable Care, 97; Side Path, 349.

Homestead—Alimony, 114; Cancellation of Mortgage, 384; Community Property, 458; Daughter's Property, 441; Intent to Return, 312; Oil Lease, 150.

Homicide—Accident, 41; Bad Moral Character, 59; Dying Declaration, 59, 133; Evidence, 133; Self Defense, 59, 133; Specific Intent, 59, 133; Threats, 150; Uncommunicated Threat, 114.

Husband and Wife—Abandonment, 77; Account Stated, 59; Agency of Necessity, 459; Alienation of Affections, 204; Ante-nuptial Agreement, 151; Attorney Fees, 41; Authority of Husband to Contract, 384; Community Funds, 258; Community Property, 41, 222, 402; Contract for Services, 402; Coverture, 97; Duty to Support Wife, 222; Estoppel, 59, 77; Lease of Community Property, 258; Letters as Evidence, 422; Partition, 77; Post Nuptial Agreement, 258; Principal and Agent, 294; Ratification, 23; Separate Property, 294; Testimony of Wife, 169; Tort of Wife, 77, 97.

Improvements—Good Faith, 151; Income, 240.

Indemnity—Attorney Fees, 77; Reimbursement, 77.

Indictment and Information—Different Owners, 41.

Infants—Emancipation, 151; Information and Complaint, 459; Prenatal Injuries, 294; Rescission, 97.

Injunction—Actionable Wrong, 115; Continuing Trespass, 169; Irreparable Injury, 41, 169; Option to Rent Lands, 187; Possession and Improvement, 23; Release, 77; Status Quo, 41, 59; Subsidiary Corporation, 41; Suit on Bond, 258; Trespass, 151.

Innkeepers—Bailee for Hire, 259, 384; Burden of Proof, 97; Disorderly Patron, 366; Negligence per se, 115.

Insurance—Accident, 23; "Accidental Death," 459; Accidental Discharge of Gun, 169; Ambiguity, 115; Answers, 151; Assignment, 402; Authority of Agent, 259; Autopsy, 330; Breach of Contract, 222, 259; Breach of Warranty, 240; Cancellation, 277; Casualty Policy, 169; Cause of Action, 259; Change of Beneficiary, 77; Co-extensive Policies, 330; Death of Beneficiary, 97; Death by Robber, 222; Death in Army, 277; Default of Treasurer, 277; Delay in Payment, 241; Delivery of Policy, 133; Disease Common to Both Sexes, 259; Employment of Minor, 422; Employers' Liability Policy, 294; Estoppel, 77; Explosion, 169, 241, 441; Extended Insurance, 366; Extra-territorial Effect, 313; False Statement, 422; "Father" or "Mother" Include Stepfather and Stepmother, 259; Fidelity Bond, 349; Foreclosure Sale, 259; Foreign Corporation, 97; Forfeiture, 133; Hazardous Occupation, 441; Incontestability, 41; Incriminating Testimony, 277; Injuries During Initiation, 422; Injury Outside State, 259; Insurable Interest, 241; "Issue" of Policy Defined, 204; Joint Policy, 187; Knowledge of Illness, 384; Lex Loci Contractus, 349; Liability, 277, 366; Loss in Transit, 422; Material Misrepresentation, 204; Military Service, 187, 204, 222, 295, 384, 422; Misappropriated Premiums, 422; Misrepresentation, 367; Mutual Benefits, 241; Mortgage, 151; Negligence, 115; Notice of Cancellation, 367; Parol Contract, 349; Passenger in Airplane, 367; Place of Bringing Action, 204; Prohibited Occupation, 187; Prohibited Provisions, 422; Proof of Loss, 367, 403, 459; Proximate Cause of Death, 295; Reformation of Policy, 23, 97, 313; Regular Army, 423; Reinstatement, 23, 204; Right of Action, 313; Right of Insurer, 169; Right to Chance Beneficiary, 277; Robbery in Locked Vault, 423; Sole Ownership, 42; Standard Form, 349; Surety Bond, 459; Switchman, 295; Waiver, 115; War Clause, 204; Wind Storm, 459.

Internal Revenue—Delivery of Liquor in Bond, 241; Previous Taxes, 204; Profit by Sale of Corporate Stock is Income, 441; Removal of Untaxed Liquors, 295.

Interpleader—Conflicting Bids, 59.

Intoxicating Liquors—Bone Dry Laws, 205; Complaint Sufficient, 295; "Concurrent" Power, 441; Corpus Delicti, 187; Court Cannot Say 2.75 Per Cent is Intoxicating, 423; Eighteenth Amendment, 133; Forfeiture, 115; Illegal Transportation, 241; Incomplete Process, 459; Insufficient Evidence, 313; Internal Revenue, 204; Joint Ownership, 277; Knowledge of Manufacture, 259; Locked Safe, 384; Loss of Suit Case, 277; Manufacturing, 295; Medicinal Purposes, 423; Note for Payment of License Void, 222; Nuisance, 169; Perfumery Still, 204; Personal Use, 222; Police Power, 384; Possession of Unusual Quantity, 349; Prima Facie Case, 313; Proof of Sale, 187; Purchase for Transportation, 384; Quantity as Evidence, 330; Reed Amendment, 331; Reputation of Place, 459; Search and Seizure, 205; State Law, 205, 277, 295, 313, 367, 385, 403, 423, 441; Steamship, 331; Storage in Home, 277; Transportation, 23; Unlawful Search, 385; Unlawful Use of Vehicle, 313; Use as Beverage, 187; "Violation of Law," 385; Volstead Act, 23, 97.

Joint Adventures—Fidelity Between Members, 59; Right of Action, 423; Secret Profits, 205; Waiver of Contract, 223.

Judges—Election of Successor, 151.

Judgment—Collateral Attack, 77, 133; Constructive Service, 169; Executory Contract, 23; Extrinsic Evidence, 97; Fraudulent Warrant of Attorney, 459; Jurisdiction, 97; Law and Fact, 97; Non-resident Defendant, 151; Priority, 151; Setting Aside, 77; Specific Allegation, 459; Statute of Limitations, 59.

Judicial Sales—Deficiency, 77.

Jury—Habeas Corpus, 115; Remittitur, 59.

Landlord and Tenant—Alteration of Garage, 331; Arbitration of Rent, 295; Attorn, 151; Breach of Covenant to Repair, 223; Breach of Lease, 403; Constructive Eviction, 313; Continuous Term, 187; Countermand of Order, 459; Covenant Against Assignment of Lease, 423; Cutting Trees, 403; Doctrine of Emblements, 259; Extension of Lease, 223; Forcible Entry, 385; Guest of Tenant, 23; Holding Over, 23, 367; Housing Laws, 223; Lease for Saloon Purposes, 385; Lease Upon Condition, 385; Loss of Profits, 97; Mesne Profits, 97; Month's Notice, 169; Mortgage Lien, 133; Mutuality of Consideration, 295; Negligent Repairs, 349; Order of City Department, 423; Personal Conduct, 77; Possession, 151; Privity, 23; Reasonable Rent, 331; Recovery of Personality, 349; Renewal of Lease, 259, 403; Repairs, 241; Right of Recovery, 459; Safety of Premises, 241; Subletting, 77, 367; Tenant at Will, 169, 187; Termination of Lease, 223, 349; Title to Premises, 295, 331; Void Conveyance, 133; Voluntary Surrender, 259.

Larceny—Recent Possession, 133; Resistance, 59.

Libel and Slander—Charge Against Post Master, 367; Fatal Variance, 295; Ineffectiveness, 459; Innuendo, 403; Privileged Communication, 295, 331, 441; Privileged Statement, 223; Publication, 97; Reasonable Investigation, 205; Release from Liability, 423; Untrue Advertisement, 331.

Licenses—Blue Sky Law, 385; Easement in Land, 403; Occupational Tax, 331; Regulation, 23; Revocable, 97.

Life Estates—Adverse Possession, 133; Growing Crop, 77; Improvements, 423; Mortgage, 97; Outstanding Title, 151; Security, 459; Taxes, 133; Waste by Life Tenant, 385.

Limitation of Actions—Commencement of Limitation, 115; Express Contract, 59; Foreclosure, 59; Insanity, 133; Installments, 77; Laches may be invoked against Government, 423; Lex Fori, 23, 42; Payment of Interest, 59; Starting Point, 59.

Logs and Logging—Condition Subsequent, 115; Irreparable Injury, 115; Reversionary Interest, 187.

Malicious Prosecution—Former Acquittal, 42; Liability of Witness, 423; Probable Cause, 97, 115, 151.

Mandamus—Alternative Writ not Pleading, 169; Duties of Public Officers, 331; Extent of Agreement Immaterial on Right to Remedy, 403; Omission of Question to Voters, 259; Sheriff as Stakeholder, 459; Want of Funds, 349.

Marriage—Disappearance of Former Husband, 241; Presumptively Valid, 115.

Master and Servant—Accident, 403; Accidental Injury, 459; Anticipation of Injuries, 277; Arbitrary Award, 385; Arising Out of Employment, 259; Assault by Another Employee, 403; Assumption of Risk, 133; Bursting Blood Vessel an "Accident," 223; Casual

Employment, 259; City Firemen not Employee, 367; Constitutional Law, 115; Contract Releasing Liability, 169; Corporate Officer as Employee, 441; Course of Employment, 169, 259, 277, 295, 331, 349, 367, 403, 423; Death of Adult Son, 313; Death from Pneumonia, 441; Defective Insulation, 385; Delegation of Duty, 403; "Dependent" Defined, 277; Double Employment, 459; Duty to Servant, 295; Electric Shock, 331; Elevator Shaft, 403; Employee's Forgery, 278; Employees of State, 278; "Employer" Defined, 367; Employers' Liability Act, 169, 205, 223, 313, 385, 441; Employment of Minor, 313; Epilepsy, 331; Evidence of Custom, 187; Extraordinary Flood, 205; Fainting, 241; Federal Employer, 115; Fellow Servants, 169; Freezing of Hands, 367; Hastening Progress of Tuberculosis, 367; Hazardous Employment, 441; Hearsay Evidence, 459; Hernia, 403; Hoisting Machine, 259; Hours of Labor for Women, 331; Hours of Service, 170, 259, 278; Impairment of Capacity, 295; Independent Contractor, 97, 151, 460; Injury by Fellow Servant, 441; Injury While Demonstrating Ability, 423; Interstate Commerce, 423; Invention of Employee, 187; Invitee, 151; Joint Tortfeasors, 367; Knowledge of Habits of Employees, 403; Latent Defects, 97; Latent Tuberculosis, 295; Loss of Compensation Waived, 278; "Member," 367; Member of Family, 367, 441; Minor Employee, 331; Minor not an Employee, 313; Necessary Care, 403; Negligence, 42, 441, 459; Negligence of Railroad, 331; Negotiations with Wrongdoer, 223; Parent and Child, 260; Partnership, 115; Permanent Impairment, 460; Policeman a Public Officer, 349; Proximate Cause of Injury, 59, 170, 441; Reasonable Care, 170; Regular Employment, 349; Res Ipsa Loquitur, 59, 241, 385, 423; Respondent Superior, 170; Right of Action, 278; Risk of Negligence, 349; Safe Place, 151; Safe Vehicles, 424; Safety Appliance Act, 169; Scope of Employment, 151; Sharing Profits, 151; Simple Tool, 205; Sleeping Sickness, 385; Status of Claimant, 403; Supervising Work of Contractor, 385; Teamster not Employee, 260; Test of Employment, 313; Unguarded Pulley, 403; Ulcer is "Disease," 385; Unsafe Place, 223; Violation of Ordinance, 349; Workmen's Compensation Act, 77, 97, 134.

Mechanics Liens—Assignment, 134; Bond by Surety, 59; Competing Claimants, 23; Extension for Filing, 59; Money Advanced for Labor, 404; Several Tracts of Land, 151; Statute of Limitations, 205.

Mines and Minerals—Basis for Injunction, 187; Joint Lease, 23; Oil and Gas, 42; Partnership, 59; Price of Coal Lands, 442; "Producing Well," 385; Reservation, 24; Severance, 134; Termination of Lease, 278; Time Essence of Contract, 151.

Money Received—Implied Promise, 59.

Monopolies—Commodities Clause, 115; Defense, 78; Restraint of Trade, 205, 385; Sale of Mining Property, 241.

Mortgages—Assumption of Payment, 42; Constructive Notice, 278, 424; Defeasance Clause, 60, 134; "Deficiency," 349; Evading Taxes, 187; Foreclosure, 385; Legal Tender, 368; Parol Agreement, 241; Priority, 115, 442; Reconveyance, 24; Redemption, 97; Subsequent Incumbrancer, 60; Surety, 60; Undue Influence, 134.

Municipal Corporations—Anticipation of Revenue, 404; Benefit Districts, 460; Building Sidewalks, 386; Change Subsequent to Accident, 187; Claims of Materialmen, 424; Counsel, 296; Damnum Absque Injuria, 278; Death of Hospital Patient, 170; Defect in Highway, 296; Diversion of Park Property, 442; Enjoining Pay, 260; Estoppel, 187;



- "Governmental Functions," 313; Highways, 170; Ice on Sidewalk, 386, 442; Ignorance of Law, 42; Inequality of Assessment, 260; Liability for Riots, 205; Local Improvement, 260; Negligence, 313, 368; "Ordinary Business," 313; Ordinary Care, 296; Pier Site District, 424; Railroad Property, 350; Remonstrance Against Incorporation, 170; Right of Way, 170; Sale of Property, 241; Sewer Assessment Area, 442; Special Attorney, 260; Specifications for Materials, 350; Title of Ordinance, 170; Traffic Regulations, 313; Use of Public Money, 368; Validity of Ordinance, 170; Violation of Agreement, 442; Violation of Ordinance, 296; Void Contract, 331; Void Debt, 278. Waste Steam, 424.
- Names—Use of Surname by Corporation, 368.
- Navigable Waters—Right of Ownership, 260; Riparian Owner, 386.
- Negligence—Artificial Pool, 386; Attractive Nuisance, 97, 151; Box in Aisle, 332; Contributory Negligence, 42, 78, 134, 187; Degree of, 115; Driver of Fire Truck, 188; Foreseeing Injury, 60; Guarding of Machinery, 188; Invitee, 24; Liability to Guest, 223; Licensees, 424; Mistake in Supposing Fire Extinguished, 260; Police Officer, 368; Presumption of, 368; Proximate Cause, 24; Reasonable Care, 278; Safety of Wall, 188; Sand Pile, 170; Willfulness, 151.
- Novation—Abandonment of Contract, 78.
- Nuisance—Damages, 313; Joint Tortfeasors, 350.
- Officers—Failure to File Expense Account, 278; Office not Property Right, 332; Removal, 170; Vacant Office, 188.
- Parent and Child—Duty to Support Child, 386; Employment of Minor, 424, 460; Liability for Support, 152, 188; Negligence of Parent, 205; Transaction Between, 404.
- Partition—Burden of Proof, 60; Improvements, 152.
- Partnership—Chattel Mortgage, 152; Dissolution, 42; Garnishment, 152. Keeping Books, 188; Liability, 152.
- Patents—Aggregation, 42; Benefits, 24; Common Expedients, 152; Estoppel, 78; Invention, 24, 60; Patentability, 115.
- Perpetuities—Charitable Use, 24; Suspension of Alienation, 42.
- Physicians and Surgeons—Drugless Healing, 241; Express Contract, 42; Isolated Treatments not "Practice," 260; Negligence, 223; No Relation of Master and Servant, 424; Ordinary Care, 314; Reasonable Care, 115.
- Pleading—Admissions, 98; Inconsistent Defenses, 134.
- Pledges—Equitable Lien, 60.
- Post Office—Unmailable Matter, 404.
- Powers—Intent of Life Tenant, 205.
- Principal and Agent—Agency, 115; Authority of Agent, 152, 170; Authority of Manager, 170; Authority to Collect Rents, 260; Authority to Give Warranty, 223; Imputability, 78; Joint Tortfeasors, 352; Liability of Agent, 78, 152; Mandate, 296; Payment of Note to Third Party, 386; Proof of Agency, 24; Ratification, 78; Repudiation, 78; Revocation, 152; Salesman's Lost Profits, 350; Scope of Agency, 134.
- Principal and Surety—Change of Contract, 134; Delay, 460; Exoneration of Surety, 24; Extension of Time, 296; Insurance Contract, 134; Release, 24, 350; Waiver of Notice of Termination of Contract, 368.
- Process—Amendment, 98.
- Prohibition—Disputed Facts, 60.
- Property—Personal Chattel, 42; Secret Process Salable, 350.
- Public Service Commissions—Change of Prices, 350.
- Railroads—Burden of Proof, 314; Care of Passengers, 188; Contributory Negligence, 223; Crossing, 60; Damages to Abutting Property, 332; Directors, 115; Employers' Liability Act, 223; Federal Control, 98; Freight Tariffs, 205; Grade Crossings, 205; Income Tax, 278; Injuries from Collapse of Shed, 170; Interstate Commerce, 242; Joint Tortfeasor, 170; Last Clear Chance, 115; Liability to Furnish Tank Cars, 242; Liability to One on Right of Way, 242. Liable as Insurer for Fire, 442; Licensee, 60; Maintenance of Mail Crane, 206; Negligence, 98, 296, 350, 368, 424; Operation at Loss Not Required, 223; Presumption of Negligence, 278; Proximate Cause of Injury, 350; Public Domain, 242; Receiver's Negligence, 332; Res Ipsa Loquitur, 134; Reversion of Land, 332; Risk of Injury, 98; Safety Appliance, 98; Side Track Connection, 350; Special Danger, 24; Speed Not Negligence, 278; Stop, Look and Listen, 152, 332. Termination of Federal Control, 404; Wantonness, 296; Warning, 60.
- Receivers—Breach of Trust, 242; Counsel, 350; Federal and State Laws, 404; Party to Litigation, 332; Right of Action, 296.
- Receiving Stolen Goods—Guilty Knowledge, 134.
- Reformation of Instruments—Mistake, 116, 424; Mutual Mistake, 60, 78.
- Release—Enforceable Claim in Bankruptcy, 206; Joint Tortfeasors, 24; Mutual Mistake, 42; Surety, 78.
- Religious Societies—Breach of Contract, 170; Factional Dispute, 152; Mortgage of Realty, 424; Quorum, 368; Right of Action, 368.
- Remainders—Merger, 152.
- Removal of Causes—A State is not a "Citizen," 424. State Liquor Tax, 188.
- Replevin—Burden of Proof, 134; Stock Law District, 332.
- Sales—Acceptance, 42, 368; Accord and Satisfaction, 260; Breach of Contract, 188, 223, 296; Breach of Warranty, 188; Cancellation, 78; Completion, 386; Condition, 442; Condition Precedent, 424; Conditional Sale, 223; Conformity to Sample, 332; Contract of Service or Hire, 206; Contract to Repurchase, 206; Delay in Delivery, 350; Delivery, 24, 206, 332, 404. Divisible Contract, 242; Executory Contract, 134; Express Warranty, 78; Failure of Consideration, 60; Forfeiture of Payments, 188; F. O. B., 60; Immoral Object, 42; Implied Warranty, 116, 152, 278.

- 286; Impossible Performance, 78; Indefinite Contract, 350; Installments, 242; Instructions to Jury, 278; Measure of Damages, 24, 242, 332, 386; Passing of Title, 98; Railroad Embargo, 206; Reasonable Time, 460. Remote Damages, 314; Rescission, 60, 78, 98, 116, 152, 206, 368, 460; Sale in Transit, 368; Substantial Performance, 404; Temporary Embargo, 424; Use Not Evidence of Acceptance, 242; Useless Formality, 296; Vesting of Title, 350; Warranty, 206, 242.
- Salvage—Participation in Award, 116.
- Seamen—Measure of Damages, 424; Seaworthiness, 98.
- Seduction—Chastity, 24.
- Schools and School Districts—District Taxes, 206; Vaccination, 116.
- Specific Performance—Equity, 60, 134; Incomplete Contract, 386; Innocent Purchaser, 134. Mutual Mistake, 116; Option, 116; Return of Money, 386; Rise in Value, 314; Time of Essence, 116; Uncertainty, 42.
- States—Common Law, 134; Filing of Claims Against, 332; Indebtedness, 242; Negligence, 24.
- Statutes—Ambiguity, 98; License Fee Not Tax, 368; Punctuation Marks, 386; Repeal of Former Enactment, 296; Special Privilege, 460; Taxation, 98.
- Street Railways—Carrying Policemen and Firemen Free, 260; Change in Rates, 332; Construction of Ordinance, 460. Contributory Negligence, 404; Diversion from Usual Course, 224; Humanitarian Doctrine, 404; Last Clear Chance, 116; Look and Listen, 42; Negligence, 404.
- Subrogation—Negligence of Physician, 188.
- Sunday—Liability to Broker, 314; Recovery for Services on Sunday, 206; Violation of Law, 332.
- Taxation—Assignment of Deposit, 350; Classification, 42; Condition to do Business, 442; Double, 350; Exactions, 98; Exemption of Land Banks, 314; Exempting Reserve, 404; Federal Owned Corporation, 314; Legal Title, 24; Public Use, 242; Remedial Statutes, 296; Sale for Partly Paid Taxes is Null, 314; Transfer Tax, 314.
- Telegraphs and Telephones—Conditions, 206; Damages, 98; Interstate Commerce, 332; License Tax, 424; Mental Anguish, 134, 368; Non-delivery, 332; Validity of Stipulation, 332.
- Tenancy in Common—Adverse Possession, 116; Purchase by Tenant, 24.
- Theaters and Shows—Negligence, 460.
- Time—Sunday, 332.
- Torts—Advice, 42.
- Trade Marks and Trade Names—"Dope," 134; Geographical Name, 116; Good Faith, 116; Jurisdiction of Trade Commission, 224; Must Owner be Manufacturer, 152; Priority, 152; Unfair Competition, 116.
- Trade Unions—Suspension of Members, 78.
- Trespass—Burden of Proof, 116; Exemplary Damages, 98; Licensee, 78.
- Trial—Preponderance of Evidence, 98.
- Trover and Conversion—Measure of Recovery, 460; Use and Dominion, 116.
- Trusts—Annulment, 314; Confidential Relation, 260; Constructive Trustee, 134; Devise to Class, 98; Recovery of Advancements, 224; Resulting Trust, 98; Revocation of Will, 242; Sale by Trustee, 78.
- United States—Agent of, 206; Soldier Injured on Railroad, 460; Suit Against Emergency Fleet Corporation, 314.
- Usury—Renewal Note, 350.
- Vendor and Purchaser—Agreement to Convey, 60; Assignee, 98; Bona Fide Purchaser, 314; Constructive Notice, 24; Easement, 116; Forgery, 152; Good Record Title, 260; Indivisible Contract, 224; Misrepresentations, 368; Option, 386, 460; Possession, 60, 404; Rescission, 116, 188; Specific Performance, 368; Subsequent Purchasers, 116; Vendor's Lien, 116, 134, 206, 314; Waiver of Lien, 404.
- War—Constructive Service, 424; Enemy Owned Property, 242, 368; Enemy Partnership, 404; Extent of War Powers, 152; President's Power to Appoint General Court, 260.
- Warehousemen—Habitual Drunkard, 314; Liability, 460; Negligence, 188.
- Waters and Water Courses—Act of God, 98; Diversion, 60; Inequality of Rates, 350; Natural Water Courses, 78; Obstruction, 116; Quasi Legislative Act, 224; Right to Build Dam, 224; Surface Waters, 42; Widening of Drain, 368.
- Wills—Accumulation, 224, 386; Ademption, 188; After-Born Child, 78; Appraised Value, 368; "Bodily Heirs," 460; "Cash on Hand," 242; Codicil, 386; Condition Subsequent, 460; Contract of Survivorship, 188; Conversion of Land to Personality, 404; Deed to Avoid Probate Cost, 260; Description of Devise, 78; Devise in Trust, 442; Disbursements by Heir, 188; Estate in Fee, 314; Foreign Probation, 442; Gift Over, 314; Incapacity, 314; Insane Delusion, 78; Insanity, 206; Intent, 42, 116, 314; Issue, 24; "Issue" not "Heirs of the Body," 442; Lost Will, 442; Mental Impairment, 60; Misdescription of Land, 242; Mutual Wills, 386; Objects of Bounty, 134; Personal Property, 152; Presumption of Existence, 368; Residuary Clause, 42; Residuary Legatee, 460; Restraint on Alienation, 442; Resulting Trust, 296; Revocation, 98; Signature, 24; Sound Mind, 152; Termination of Life Estate, 224; Testamentary Act, 98; Testamentary Capacity, 42, 98, 134, 386; Trust, 24, 460; Trust Fund, 314; Undue Influence, 242, 424, 442; Unnatural Disposition, 152; Vesting, 78; Vesting of Remainder, 188; Widow not "Legal Heir," 296.
- Witnesses—Competency of Wife, 98; Confidential Communication, 116; Cross Examination, 24, 116; Incompetency, 134; Mayor as Witness, 386; Privileged Communication, 442; Trade Secrets, 260.
- Workmen's Compensation Act—Arising Out of, 224; Award Disaffirmed by Minor, 224; Calson Disease, 224; Constructive Notice, 224; Course of Employment, 224; Heart Trouble, 224; "Knowledge" Defined, 260; Loss of Phalanx of Finger, 224; Odd Lot Doctrine, 188; Refusal to Submit to Operation, 296.

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